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NEW JERSEY EQUITY REPORTS.

VOLUME XXI.

C. E. GREEN, VI.

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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

CHARLES EWING GREEN, Reporter.

VOL. VI.

TRENTON:

MURPHY & BECHTEL, PRINTERS.

1871.

A



CHANCELLOR

DURING THE PERIOD OF THESE REPORTS,

Hon. ABRAHAM O. ZABRISKIE.



CLERK IN CHANCERY,

BARKER GUMMERE, Esq.

Judges of the Court of Errors and Appeals.

EX OFFICIO JUDGES.

HON. ABRAHAM O. ZABRISKIE, CHANCELLOR.

“ MERCER BEASLEY, CHIEF JUSTICE.

“ JOSEPH D. BEDLE,

“ VANCLEVE DALRIMPLE,

“ GEORGE S. WOODHULL,

“ DAVID A. DEPUE,

“ BENNETT VAN SYCKEL,

“ EDWARD W. SCUDDER,

} Associate Justices
Supreme Court.

Judges Specially Appointed.

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“ EDMUND L. B. WALES,

“ JOHN CLEMENT,

“ GEORGE VAIL,

“ JAMES L. OGDEN,

“ CHARLES S. OLDEN.

This volume commences with the unreported opinions delivered in the Court of Chancery, at February Term, 1870; and embraces all the opinions delivered in that court up to the close of February Term, 1871, and all opinions in the Prerogative Court during the same period; and commencing with the unreported opinions in equity cases in the Court of Appeals of March Term, 1869, concludes with November Term, 1870.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1870.

ABRAHAM O. ZABRISKIE, ESQ., CHANCELLOR.

QUICK'S EXECUTOR *vs.* QUICK and others.

1. The rule in Shelley's case must govern in the construction of wills made prior to June 13th, 1820, in all cases where it is applicable.
2. The rule applies, even when another estate for life is interposed between the death of the first tenant for life, and the estate to his heirs.
3. A devise, upon the decease of a tenant for life, to heirs "as the law directs" in case of dying intestate, means as the law was at the time of making the will, and not as it might be at the death of the tenant for life.
4. Such limitation, as it gives the estate at the death of the life tenant to persons who may not then be his heirs-at-law, or in shares different from those prescribed by the law at that time, prevents the application of the rule in Shelley's case. And the heirs of the tenant for life, or such persons as would have been his heirs, had he died at the date of the will, must take as purchasers at the death of the tenant for life.

This cause was argued on final hearing, upon the pleadings and proofs.

Mr. Van Fleet, for complainant.

Mr. Bird, for defendant, S. G. Quick.

Quick's Executor v. Quick.

Mr. Wurts, for defendant, Jonathan Quick.

Mr. Blake, for the other defendants.

THE CHANCELLOR.

The object of this suit is to procure the direction of this court as to the duty and power of the complainant as executor of Ezekiel Quick. For this purpose it is necessary to settle the construction of provisions in the will of Jacob Quick, the father of Ezekiel, as well as those in the will of the latter. Jacob Quick died in November, 1816; his will was executed on the 28th day of August, 1808, and admitted to probate December 11th, 1816. By it he gave a farm of 120 acres to his son Ezekiel for life, and to his widow, in case he should leave one, during her widowhood only; and then directed, "and at the decease of his widow, the said devised tract of land is to go to his heirs, to be divided among them as the law directs in case of dying intestate."

Ezekiel Quick died July 1st, 1867, having made a will, dated January 18th, 1848, which was admitted to probate July 19th, 1867. By this he gave to his wife, for her life, the farm devised to him by the will of his father, and which he occupied as his homestead; and by the next clause of the will he annexed to that farm a strip of eight acres on the west side, which he had purchased from the heirs of his brother, and directed that it should be held as part of that farm forever. In the fifth clause he gave to his son Richard a farm of 130 acres; and in the sixth clause, reciting that his son Richard, by the will of Jacob Quick, was entitled, at the death of his mother, to one-sixth of the farm on which he, the testator, then lived, and that Richard, for full consideration, had conveyed that sixth to him, he gave and bequeathed all the right of Richard so conveyed to him, to his son Jonathan, in fee; and he provided that if Richard, or any one for him, should try to hold the right so conveyed to him, and by him devised to Jonathan, that, in such case, Richard should not have the farm he had devised to him, but that it

Quick's Executor v. Quick.

should go to Jonathan. He gave \$300 to each of the four sons of his deceased daughter, Elizabeth Lewis. He expressly declares that he shall make no bequest to Ellen and William Hoppock, the children of his deceased daughter Sarah, as they were well provided for otherwise. To his son Joseph, he gave a farm, and to his son Charles, \$1800. He ordered his executors to sell all his property not otherwise disposed of by that will, and after paying his debts and expenses, to pay the remainder to his two sons, Charles and Jonathan.

The heirs of Ezekiel at his death were his four sons, Richard, Jonathan, Joseph, and Charles, and the four sons of his daughter Elizabeth, and the son and the daughter of his daughter Sarah.

The will of Ezekiel was evidently written under the impression that the will of his father vested in him only a life estate in his homestead farm, with the remainder, after the death of himself and his wife, to the persons who would be his heirs. If he had supposed that Jacob's will gave him the fee, as it is contended that it did, he would have made a different disposition of his property; and by such construction his intention in disposing of his own property among his children will be entirely frustrated. But whatever effect this consideration might have upon the construction of the will of Ezekiel, it can have none upon that of Jacob. It must be construed according to the settled rules of law.

The question on Jacob's will depends upon the application of the rule known as the rule in Shelley's case. By that rule, when the same instrument which gives an estate for life by express words, in a subsequent part gives the same property, at or after the death of the life tenant, to his heirs, or the heirs of his body, the grantee or donee for life takes an estate of inheritance in fee or fee tail, and his heirs at his death do not take as purchasers, but inherit by virtue of the limitation; and this rule applies even where another estate for life, as in this case, is interposed between the death of the first tenant for life and the estate to his heirs. This rule, which is in harmony with the theory of the common

Quick's Executor v. Quick.

law with regard to the conveyance and transmission of lands, has been settled as the law of England for centuries, and has been adopted, by repeated decisions, as the law of this state, and is still the law of this state as regards the construction of deeds. But it is one of those artificial rules of construction which gives to the terms used for these provisions an effect different from that suggested by them to any one not versed in these rules, and therefore it was found often to mislead testators, and its application to disappoint their evident intentions, and, as in this case, to mislead the devisees; and it was, therefore, so far as wills are concerned, in effect, abolished in this state by the first section of an act passed June 13th, 1820. *Rev. Laws* 774. But it was in force at the date of this will, which must be construed by it if, by the decisions in England and this state which control our courts, it applies to this will.

In *Kennedy v. Kennedy*, 5 *Dutcher* 185, in construing a devise similar in most respects to this, the rule and its application were carefully considered by the Supreme Court in an opinion delivered by Chief Justice Whelpley. The decision in that case, it being the decision of the law court to whom such a question most properly belongs, and the decisions of the English House of Lords in *Jesson v. Wright*, 2 *Bligh* 1, and of the English Court of Common Bench in *Jordan v. Adams*, 6 *C. B.* 764, which are cited with approbation, and relied on in *Kennedy v. Kennedy*, must guide this court in the application of the rule.

In *Kennedy v. Kennedy*, the court held that the rule in Shelley's case is the settled law of this state, and that no discussion of the principles upon which it is founded is necessary. "That it was adopted to give effect to the paramount intent of the testator. The word heirs will yield to a particular intent that the estate shall be only for life, and that may be from the effect of super-added words, or any expression showing the particular intent of the testator; but that must be clearly intelligible and unequivocal." In that case the devise was "to my son, R. H. Kennedy, and to his

Quick's Executor v. Quick.

proper benefit and behoof during his natural life, and to his heirs, to be divided among them as the law may direct, after his death." In that case there was no other provision to affect this devise. The gift to heirs to be divided as the *law may direct*, is a gift to heirs *as heirs*, and as the law of inheritance may then be; and this shows no particular intention contrary to the paramount intent of the testator carried into effect by the rule in Shelley's case, or that could interfere with the application of the rule.

In *Jesson v. Wright*, the devise was to W. for his natural life; after his death, to the heirs of his body, in such shares as he should by deed or will appoint; and for want of such appointment, to the heirs of his body, share and share alike, *as tenants in common*; and if but *one child*, the whole to *such child*. The Court of King's Bench, which first decided this case, held that there were sufficient indications of a contrary intent to take this devise out of the rule in Shelley's case. In the House of Lords, Lord Eldon held that the paramount intention to give the remainder "to the heirs of the body," a technical expression which has a certain settled meaning, was not overruled by any clearly expressed particular intent; that the provisions for holding in such shares as W. should appoint, or as tenants in common, was impossible. There can be but one heir of the body at the same time in England, the next heir only comes into being at his death, and therefore they could never hold as tenants in common, or in shares under an appointment.

Lord Redesdale, in his opinion in that case, held that the words heirs of the body, having a clear settled technical meaning, could not be controlled without some clear expression or necessary implication. "*That technical words should have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise.*" That although heirs of the body cannot take as tenants in common, it does not follow that the testator did not intend that heirs of the body should take, because they can not take in the mode prescribed.

Quick's Executor v. Quick.

In *Jordan v. Adams*, Erle, C. J., in delivering the opinion of the court, says that it is clear that a devise to a man for life, with remainder to the heirs male of his body, does create an estate tail, "unless a judicial mind sees with reasonable certainty, from other parts of the will, the testator's intention;" and that the court, while aware of the importance of maintaining the doctrine of *Jesson v. Wright* where it applied, thought, for reasons assigned, that it did not apply in that case.

The terms of the devise in Jacob Quick's will are much the same as those in the case of *Kennedy v. Kennedy*; in that case the devise was to R. H. K. during his natural life, and to his heirs to be divided among them *as the law may direct* after his death. In Jacob Quick's will the devise is to Ezekiel during his natural life, at his death to his widow during widowhood and no longer, and at her decease to go to his heirs to be divided among them *as the law directs* in case of dying intestate. The intervening life estate does not affect the application of the rule, and unless there is a difference of intention clearly indicated by the words "as the law directs," from that indicated by the words "as the law may direct," this case must be governed by the decision in *Kennedy v. Kennedy*. In that case the words as the law may direct in a devise to heirs as heirs, indicated that the testator intended that they should take as heirs by inheritance, as the law of inheritance should direct at the termination of the life estate. In this case the testator first indicates that his paramount intention was to give it to such persons as should be the heirs of Ezekiel at his death, but he as clearly indicates that he intended to control the division of it among these heirs, and that not by the law as it might stand at the death of Ezekiel, but as it then stood; "as the law directs," means this, in contradistinction to the law as it shall then stand, indicated by the words "as the law may direct." At the date of this will, 1808, the act of 1780, (*Pat. Laws 42*), the first statute to regulate descents passed in this state, was in force. That had abolished the English

Quick's Executor v. Quick.

law of primogeniture and the exclusion of female descendants, and gave to each female in the same degree from the ancestor, one share to two shares to a male. This remained the law of the state until it was changed by the act of February 5th, 1816, (*Pamph. Laws* 7,) by which males and females inherited equally. This law of descent was strongly impressed upon and well known to all the freeholders of the state. There was a strong inclination among them towards some preference of male heirs over females, long after the abolition of the exclusive preference and the law of primogeniture, and it was retained for years after the act of 1816, as will be shown by the records of wills in all the counties of the state. The law, as it existed in 1808, was well known to Jacob Quick, and he expressly adopted the division of two shares to a male, and one to a female, as the mode of dividing his property among the children and descendants of his son. The will would not be more clear if he had used the words of the act of 1780, instead of the words "as the law directs."

No one can doubt but that Jacob intended that Ezekiel should have an estate for life only, without power of alienation, but that intention is overruled by the rule in Shelley's case, which gives construction to the words he has used, whatever may have been his intention, unless he has clearly and by positive words declared an intention capable of being executed, inconsistent with that rule. The English courts have repeatedly held that a devise to the heirs, or heirs of the body of the tenant for life, as tenants in common, or equally to be divided between them, did not prevent the operation of the rule, although it might indicate a different intention on the part of the testator. But this seems placed upon the ground, that as by the law of England, but one heir or heir of the body could exist at one time, the heirs or heirs of the body could never be tenants in common; and that as the words heirs or heirs of the body were technical terms with well settled meanings, they could not be overruled by a subsequent disposition, which could not be

Quick's Executor v. Quick.

carried out if the legal meaning was given to the word heirs, but only by a positive subsequent disposition entirely inconsistent with that meaning. This was the foundation of the reasoning in the judgments of Lords Eldon and Redesdale in *Jesson v. Wright*; and the reasoning of Justices Erle and Williams in *Jordon v. Adams*, by which they show that the clear provisions of the will in that case took it out of the rule, is founded on the same principle; and of the declaration of Chief Justice Whelpley in *Kennedy v. Kennedy*, "that the words *heirs* or *heirs of the body* will yield to a particular intent that the estate shall be only for life, and that may be from the *effect* of the superadded words, or any expressions showing the particular intent of the testator, but that must be clearly intelligible and unequivocal." And the effect of the strong and clear words "to him, his heirs and assigns forever," the words peculiarly chosen for giving a fee simple, will be limited and overruled by clear words in a subsequent part of a will, giving the estate over in case the devisee dies without leaving issue at his death.

In this case, the paramount intent of the testator to give this farm to the heirs of Ezekiel, at his death, is not overruled or frustrated. The persons to whom it will go are his heirs, in any sense of the term; the same persons to whom it would be given by the rule in Shelley's case. And this paramount intent is not affected, nor is the word heirs given a sense or meaning different from what was its legal meaning; it is used precisely in what was its legal meaning in 1808, at the date of this will.

The will of the testator that the males shall, in the division, have two shares to each share by a female, is expressed as clearly, unequivocally, and intelligibly as is required in the cases above cited. And the only way by which this intention can be carried out, is to declare that this devise is not within the rule in Shelley's case. By this conclusion, the intention of Jacob will be fully carried out, without violating any rule of law, and the intention of

Quick's Executor v. Quick.

Ezekiel, founded on this construction of the will, will also be carried into effect. He had a right to assume this to be the legal construction, because this court, in *Quick v. Quick*, *Sart.* 4, where a devise in the same will to another son, made in the same words, came in question, the court took for granted that it gave an estate for life only, with remainder over to the persons who were his heirs.

Although the act of 1780 was changed at the death of Jacob, in November, 1816, yet this will speaks as of the time it was executed, and the farm will go to Ezekiel's children as if he had died in 1808; that is, one-fifth to each of his four sons, except Richard, one-fortieth to each of the four sons of his daughter Elizabeth, one-fifteenth to the son of his daughter Sarah, and one-thirtieth to her daughter.

Richard Quick conveyed one-sixth of this farm to his father, Ezekiel, in his lifetime. On account of the contingent nature of his estate, that deed may not have been efficient as a conveyance in Ezekiel's life; yet, as it was with full covenants, and Richard survived his father, it is a good conveyance by estoppel, and the devise of that one-sixth to Jonathan vests it in him, in addition to his own one-fifth. He is, therefore, entitled to eleven-thirtieths of this farm, and Richard retains one-thirtieth. The strip of eight acres which Ezekiel annexed to this farm, as part of it, forever, by virtue of that annexation must go with it, and be considered as devised to the owners of the farm.

Upon this view of the case, neither the homestead farm occupied by Ezekiel, nor the strip annexed to it, can be held as part of his property undisposed of; and, of course, the executor has no power to sell either.

The examination of the case has satisfied me that the diversity of views taken of the questions involved, by the courts, made it a proper case for the complainant to ask the opinion of the court upon his duty and power, and I shall, therefore, order his costs, including a proper counsel fee, to be paid out of the estate. As the defendants have caused no unnecessary expense, but only such as was necessary to bring

Thomas' Executors v. Anderson's Administrator.

the case fairly before the court, I think their taxable costs ought to be paid out of the estate; but their counsel fees and other expenses must be paid by themselves. These expenses would have been necessarily incurred in settling their rights as between themselves.

THOMAS' EXECUTORS vs. ANDERSON'S ADMINISTRATOR and others.

A gift of the interest of \$12,000 to A during life, and, at her death, of the principal to B, is a vested legacy, and if A survives B, goes, upon her death, to B's representatives.

This cause was heard upon bill and answers.

Mr. A. P. Condit, for complainants.

Mr. Bradley, for residuary legatees.

Mr. Teese, for Anderson's administrator.

THE CHANCELLOR.

The main question in this case arises upon the will of Luther Goble, deceased. It is whether, a bequest to his daughter Abby, whose administrator is one of the defendants, was vested, or contingent, and lapsed upon her death. The will provides as follows: "I give unto my beloved wife, during her natural life, the yearly interest of \$12,000, to be paid to her in half-yearly payments, by my executors. At her death I give the said \$12,000 to my and her daughter Abby." Abby, the daughter, was twelve years old at her father's death, married Richard Anderson, and died in the lifetime of her mother, leaving children who are still living. The bill is filed by the executors of the surviving executor of Luther Goble, who have the fund in their hands, and pray

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the direction of the court as to the disposition of it. The residuary legatees under the will of L. Goble, the administrator of Abby Anderson, and the administrator of the widow of Luther Goble, are defendants.

The residuary legatees contend that the legacy to Abby was contingent on her surviving her mother, and lapsed, by her death, into the residuum of the estate.

A legacy given at a future day, or at or upon a future event, may be vested or contingent; it is always contingent, if given at or upon an event which may or may not happen, as upon coming of age, or marriage, or surviving some living person. But it is further contended that a legacy given at a certain definite time, as ten years after a fixed day, or at a certain event, as at the death of A, which is certain to occur, is a contingent legacy, and will lapse if the legatee dies before the day or event.

This is contrary to the settled doctrine of the common law as to the vesting of remainders in real estate. By that, any remainder given upon an event which is certain to happen, as the death of a living person, is vested, and not contingent.

This doctrine as to legacies, that when given at a future day or at a certain event they will lapse by the death of the legatee, is laid down by elementary writers subject to some exceptions, which render the application doubtful. It seems to be founded on, and supported by a single decided case, though countenanced by the dicta of judges in one or two other cases, in which it was not the question decided. In 1 *Jarman on Wills* 760, it is said that when a sum of money is bequeathed at the expiration of a definite period, say ten years from the decease of the testator, the vesting, not the payment merely, is deferred; it is there joined, and put on the same footing, with a bequest to one at the age of twenty-one, which is always an uncertain event. The authority cited is *Smell v. Dee*, Salk. 415. In 1 *Williams on Executors* 1107, the doctrine of that case is cited with approbation, and the dicta in *Bruce v. Charlton*, 13 Sim. 68, are referred to in support of it.

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The case of *Smell v. Dee* expressly supports that doctrine, and the decision is founded upon it, but the decision is not supported by the authorities referred to, and is contrary to the uniform current of later decisions in England and this country, and the number maintaining the opposite doctrine is large. The dictum of Vice Chancellor Shadwell, in *Bruce v. Charlton*, is simply a repetition, almost verbatim, of the doctrine laid down in *Smell v. Dee*, stating it to be the established law. He was not called on, in that case, to examine into or apply it. He applies it to a supposed case, not to the facts on which he was called to decide. This doctrine is said to be founded on passages in Swinburne, and on the doctrine of the Civil law, which is the foundation, to a great extent, of our testamentary law as to legacies. But Swinburne expressly states that a legacy given at a future day or certain time, as at Easter, 1600, vests at the death of the testator. Part VII, section 23. And the Civil law is stated by Domat in section 8, title 1, (of Testaments), book 3, part 2. as follows: "The terms of legacies fixed to a certain day, such as the first day of such a year, or within such a time, do not make a condition on which the legacy may depend; and the effect of these terms is only to defer the delivery of the legacy, the right to which is already acquired by the legatee, and which, were it not for the term, would be due instantly." And although in the next section, the rule of the Civil law is stated to be different when the legacy is given at the death of another, yet it is clear that the rule in *Smell v. Dee* is not derived from or founded on the Civil law, for that was a legacy payable in ten years.

In *Williams on Executors* 1117, reference is made to a note in *Fearne* 554, as supporting the doctrine; that note relies on two cases, neither of which in any way sustain the doctrine contended for.

The English cases, in which a legacy is held to be vested when the income of a fund is given to one for life, and the principal to another at the death of such legatee for life, are numerous, and in accord with each other.

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In *Monkhouse v. Holme*, 1 Bro. C. C. 298, testator gave to his wife the interest of £800 for her life, and after her decease disposed of the £800 as follows: to B. £100, M. £200, &c. One of these reversionary legatees died before the widow. Lord Loughborough held the legacy vested. In *The Attorney-General v. Crispin*, 1 Bro. C. C. 386, the will gave several annuities, and after the decease of the annuitants, £50 each to the children of D. R. He had seven children, six of whom died before the annuitants. The legacies were held to be vested. *Benyon v. Maddison*, 2 Bro. C. C. 75; *Scurfield v. Howes*, 3 Bro. C. C. 77; *Taylor v. Langford*, 3 Ves. 119; *Lane v. Goudge*, 9 Ves. 226; *Cousins v. Schroder*, 4 Sim. 23; *Locker v. Bradley*, 5 Beav. 593; are all cases in which the income of a fund was given to one person for life, and at his death the principal was given to another, and in which the legatee of the principal died in the life of the legatee of the income; and it was held in all, that the legacy of the principal was vested, and did not lapse by such death.

The cases in the courts of this country maintain the same doctrine. *Fay v. Sylvester*, 2 Gray 171; *Barton v. Bigelow*, 4 Gray 353; *Barker v. Woods*, 1 Sandf. Ch. 129; are all cases in which the income of a certain fund was given to one person for life, and at her death the principal to other persons; and it was held that the gift of the principal was vested, and did not lapse by dying before the legatee of the income, and this was the point decided in each case. In *Van Wyck v. Bloodgood*, 1 Bradf. 154, the question arose under the same circumstances; the whole subject was there considered and examined by the surrogate with great learning and ability, and most of the cases bearing upon the question referred to and examined, and the same result is reached, that in such case the bequest of the principal vests at the death of the testator.

The conclusion to which these adjudications have reached is one founded on reason and principle, as well as authority, and will in most cases give effect to the intention of the

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testator, especially where the bequest is one to a child or a descendant.

In England, in this state and many other states, the legislature has changed the established doctrine of the common law, that a legacy lapses by the death of the legatee in the lifetime of the testator, so that the doctrine of lapse does not apply to a gift to a child or descendant of the testator.

The cases which seem to conflict with the above conclusion, are all cases in which the event or time upon or at which the legacy was given was uncertain or contingent, as upon the legatee arriving at full age, or being married, which may never occur; such provision makes the legacy itself contingent, and of course it becomes void by the death of the legatee before the event occurs. The words "at" and "when" in such cases annexed to marriage or coming of age in the gift itself, and not merely in the payment, are held to apply to the substance of the gift, and not to the time of payment, and it is in these cases of a gift or an uncertain event, that the contingency is held to be obviated by certain prior dispositions of the fund or its income. It is to such cases and to them only, that the distinction between a gift of a legacy at a future event, and the gift of a legacy to be paid at such event, applies. If the contingency does not apply to the gift, but only to the payment, the legacy vests, and the payment is postponed. A bequest of a sum to A when he shall arrive to the age of twenty-one, is contingent and may lapse. A bequest to A to be paid when he shall be twenty-one, vests the legacy, but postpones the time of payment, and the legacy does not lapse before that time.

In this case I do not think that the doctrine of appropriation can apply. No fund has been set aside or appropriated for the annuity by any competent court. Nor have the executors done any act by which either they or the legatee are bound, or entitled to consider the securities in which this \$12,000 is now invested, as appropriated to this legacy, and as payment of it.

The administrator of Abby Anderson is entitled to receive

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the sum of \$12,000, with interest on it from the death of Mrs. Goble. The surplus, if any, must pass into the residue of the estate.

KEELER vs. GREEN and RIDGWAY.

A stipulation in a lease of a quarry of a horse shoe shape, and having faces on the northwest, north, east, and southeast sides, "that said quarry shall be worked as the face is now opened," is not violated by quarrying one of the faces to a greater extent than another, and such quarrying will not be enjoined if the same general shape is preserved.

On motion to dissolve injunction upon coming in of the answer.

Mr. A. Reed, in support of the motion.

Mr. G. D. W. Vroom and *Mr. E. T. Green*, contra.

THE CHANCELLOR.

The injunction restrains the defendants from further opening the face of a quarry adjoining the feeder of the Delaware and Raritan Canal, leased to them by the complainant, beyond the face as opened at the time of the lease, and from depositing the stripping of the quarry over the northwesterly face, or within, on the interior or bottom of the quarry, or on the farm of the complainant, northwest of the quarry.

The complainant had demised this quarry to the defendants for three years from January 1st, 1868, by a lease, under seal, at the rent of \$11,000 for the term, with a right of renewal for two years at a stipulated rent. The lease provided that the lessees should have the right to use thirty men in taking out stone, but no more, except at a stipulated increase of rent for each additional man.

It contained also these stipulations: "That said quarry

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shall be worked as the face is now opened, following the good merchantable stone as deep as such stone shall run and in good quarrying shape, and so far as the water will drain with the pipes laid therein."

"That the stripping shall be deposited, the first year of the term, south of the feeder, along the bank of the same, on land of said Keeler, or in any other place designated by said Keeler opposite said quarry, not exceeding that distance; and after the first year the stripping shall be deposited within the quarry wherever it can be done without obstructing the future working of the same or covering the face thereof, and if this cannot be done, it shall be deposited as above stipulated for the first year of the term."

The bill alleges that the defendants were not working the quarry as the face was opened at the time of making the lease, and failed to follow up the good merchantable stone as deep as they run in good quarrying shape, and as far as the water will drain, and that they were stripping and working far to the south of the face as opened at the making of the lease. No other specification is given of the manner in which this stipulation is violated.

The answer fully denies this charge, positively and clearly, in as definite and particular terms as it was made, first negatively, and then by affirming that the quarry had been worked in the precise manner provided in the lease, with the exception of six stones on the bottom which had not yet been removed, but which the defendants intend to remove.

What the complainant intended to charge as the violation of this specification, cannot be ascertained from the pleadings. But from an expression in one of the affidavits annexed to the bill, and from the position taken by counsel in the argument, I infer that the complaint is that the quarry was not worked, and stone taken out to an equal extent from the face on every side. The quarry, at the date of the lease, had been opened and worked in a horse shoe shape, and its faces were on the northwest, north, and east, and southeast sides. The charge which I infer is, that it was worked mainly and

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to the greatest extent on the southeast side, and not so much, if at all, on the northwest. In the first place, the answer fully and without evasion denies the breach of agreement as particularly as it is alleged in the bill. And in the second place, had the bill charged that the quarry was worked on one side more than the other, and the fact been admitted by the answer, the agreement does not appear to me to prohibit it. It only compels the defendants to work as the face was then opened, but does not oblige them to work every part of the face to the same extent. If they should take out fifty feet from one part of the face, and only ten feet from another, it is no breach of this agreement, provided they took out all the merchantable stone to the depth indicated, and left the face in good quarrying shape, which I must take to mean with a fair even surface, and not with jagged recesses. This is not opening a new face to the quarry, but simply working it from its old face as required by the lease. The face left after taking out stone to the extent of fifty feet, would not be in the same place or constituted by the same stone as the old one, but it is the same face in the sense in which that term is used in this lease. And the defendants have the right to remove the earth above the stone on the southeast side of the quarry, called in this lease the strippings, in order to get out the stone extending from that face to the southeast. So far as the injunction restrains the opening a new face to the quarry, it must be dissolved, not because the defendants have a right to open a new face, but because what they have done and propose doing, is not opening a new face.

The injunction also restrains them from depositing the strippings on the interior or bottom of the quarry. The bill alleges that the defendants have deposited strippings inside of the quarry to the height of thirty feet, and have thereby covered good merchantable stone to the depth of four or five feet, and have obstructed the ingress to and egress from the quarry, and have covered the face of the quarry in some places, and have thus injured the future working of the quarry. The answer admits the deposit of

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strippings on the bottom of the quarry, but denies that there is any merchantable stone covered by it, or that the access to the quarry is at all injured by it, and alleges that the roads existing at the time of the lease are now open to a greater extent than they then were; and it denies that the face of the quarry is any where covered by strippings, except at the northwest side where some strippings deposited on the adjoining land of the complainant, by his consent, slid down in the quarry and covered part of its face. And the defendants aver that they do not intend to deposit any more strippings on that part of the complainant's farm.

The face of the quarry in this lease clearly means the perpendicular sides as opened, and not the *bottom* of the quarry, a term used in contradistinction to the face, and in a different sense. The deposit was required to be made on the bottom, unless it could not be made without obstructing the working of the quarry or covering the face. If there were good merchantable stone in the bottom which could be quarried to advantage, they ought not to be covered up. But the answer responsively denies that there are any; it responsively denies that the access to the quarry is obstructed by the deposit. This answer is not new matter. But the deposition read to contradict it, if it could be admitted, only says that the deposit *impedes* the ingress and egress, not that it *obstructs* it; any deposit would prevent passing over the spot where it was made, but if sufficient room was provided to pass in and out of the quarry, the access is not *obstructed*; which word does not include "made a little more inconvenient." The answer responsively denies anything that would be a breach of the agreement as to these deposits.

The strippings which were deposited on the northwest side of the quarry over its face, whether by accidentally sliding down, or by being intentionally dumped there, were put there in breach of the agreement, and to that extent the injunction must be retained.

As to the deposit on the complainant's farm, adjoining the quarry on the northwest side, the answer states that this

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was done with the permission of the complainant; this, though new matter, is not denied by the complainant in his subsequent deposition. He only says that during the first year he gave such license, and did not afterwards give any license. He does not say that he revoked the license, or that he limited it when he gave it to the first year, but only that it was given some time in the first year. Such license would be deemed a continuing license until revoked, and as it no where appears that the defendants intended or threatened to continue depositing after the license is revoked, and as they deny that they intend to continue it, this appears no proper ground for injunction.

The injunction must be dissolved, except so much as prohibits the depositing of strippings on or over the northwest face of the quarry.

The costs must abide the event of the suit.

SHOTWELL'S ADMINISTRATRIX *vs.* STRUBLE and WIFE.

1. Bill for injunction to restrain proceedings at law upon a note and sealed bill, alleged to have been given when the maker was incompetent, and also through undue influence, and also alleging that there was a pretended consideration of the conveyance or release of some lands, and asking a discovery of the consideration, and of the value thereof. Defendants answer that the consideration of the note was the release of their interest in some lands, but decline to state the value of the lands, on the ground that the release of the lands, and not their value, was the consideration; and as to the bill, that, being under seal, it needs no consideration. Motion to dissolve denied. Defendants must answer fully as to the value of the lands.

2. The complainant is entitled to a discovery of the consideration of the sealed bill, not on the ground that it would be void without consideration, but on the ground that the want of consideration, together with the imbecility of the testator and some undue influence used by the defendant in procuring its execution, might at law render the bill invalid, when the same imbecility or influence would not affect its validity, if given for a plain and acknowledged debt, justly due from the intestate.

3. If the sealed bill was obtained legally and without fraud, though without consideration, the defendants will be entitled to recover upon it

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but in such case it was an advancement by the intestate, and must be brought into hotch-pot before distribution of the personal estate, and the consideration must be disclosed.

The defendants moved for a dissolution of the injunction heretofore granted in this case. The motion was founded upon the bill, and answer of the defendants.

Mr. McCarter, in support of the motion.

Mr. Kay and *Mr. R. Hamilton*, contra.

THE CHANCELLOR.

This suit is for discovery and injunction. The complainant is the widow and administratrix of James Shotwell, deceased. The defendant, Hannah Struble, is a daughter of James Shotwell. Shotwell had an attack of paralysis on the 24th of March, 1866, and another in July, 1867; from the last he never recovered, and shortly after died. On the 31st of March, 1866, he gave to Hannah Struble his note for \$3000, payable, with interest, in five years, to her or bearer; and on the 28th of April, 1866, he gave to her a sealed bill for \$3000, payable to her or bearer one day after date. This note and bill were after his death presented by Hannah to the complainant for payment, and on refusal, suits were brought upon both, at law.

The complainant alleges that this note and this bill were procured by the defendant from the intestate when his intellect was impaired by the paralysis, and he was not capable to transact any business; that they were procured by undue influence, and were without consideration. She prays that the proceedings at law may be enjoined. The bill prays a discovery of the manner in which this note and bill were procured from the testator, and of the consideration of each, and after stating a pretence that the note was given for the conveyance or release of certain property, it prays a discovery of what the consideration consisted, and its amount and value.

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The defendants answer fully as to the time and manner of giving the note and bill, as to the capacity of the testator, the undue influence, and some other circumstances inquired into. As to the consideration of the note, the answer states that certain lands had descended to the defendant, Hannah, from her deceased mother, and that the intestate, being only tenant by the curtesy, had conveyed these in fee with full covenants of warranty; that the intestate proposed to her if she would release her estate to his grantee he would give her his note for \$3000; thereupon the defendants released these lands as requested, and the intestate gave her this note. That the interest of the defendant, Hannah, in the lands which were released was not susceptible of valuation in money, except by estimation; and that the same was estimated at the time, for the purpose of affixing revenue stamps to the release, at \$400. And the answer insists that the consideration of the note was not only the value, either real or estimated, of the interest of the said Hannah in the lands, but also the execution and delivery of the release. The answer discloses no further, the nature or value of the consideration. It refuses to disclose the consideration of the sealed bill, on the ground that being under seal it imports a consideration, and cannot be impeached either at law or in equity for want of a consideration, and therefore the defendants are not bound to disclose it.

The defendants ask that the injunction should be dissolved on the ground that they have fully answered the equity of the bill. As to the note, the bill alleges that there was no consideration, and that there was a pretended consideration of the conveyance or release of some lands, and expressly asks for a discovery of the consideration, and of the value of the consideration. The defendants answer that the consideration was the release of their interest in some lands, but decline to state the value of these lands, on the ground that the release of the lands, and not the value of the lands was the consideration. The ruling of the Supreme Court in the case of *Beninger v. Corwin*, 4 Zab. 257, is relied on to sup-

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port this distinction. But the circumstances of that case are altogether different from the present; there the note was given on an exchange of horses, for the difference in the value agreed upon by the parties. The court, on the trial, had instructed the jury that if there was no difference in the value, the note was without consideration and void. In reviewing the case, the Supreme Court held that in that case, like in case of a sale for a stipulated price where there was no fraud, the purchaser was bound to pay the price agreed upon, and not the value of the article purchased, and that a note given for such stipulated price could not be impeached for want of consideration.

In this case, if the value of the land had been \$3000, or if in a bargain for the release of the land, the intestate had agreed to give her \$3000, as an estimate of its value or the value of the release to him, it might have been a valid consideration for a note for that amount. But an offer by a father to give his daughter a note for \$3000, if she will release lands worth \$400, cannot be taken as a bargain to give that amount for the lands, but the natural and legal construction of such offer is, that the note, beyond the value of the lands, is intended as a gift or advancement, and under the circumstances of this case as detailed in the answer, I can have no doubt that such was the intention of the father, and the understanding of the daughter.

An offer to give a note for \$3000, for the surrender of a bond or mortgage for \$500, can only be construed as a gift or gratuity of \$2500. And a release of lands worth \$400, would make such note a gift, or without consideration as to \$2600, on the same principle; and the complainant was entitled to a discovery of the value of the land. And even if this cause should be permitted to be tried at law, the injunction could not be dissolved until the defendants had fully answered as to the value, which surely can be done approximately, if not with precision. This is a material part of the discovery sought, and the injunction must be retained until it is made. Besides, according to the decision

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in *Metler's Administrators v. Metler*, 3 C. E. Green 270, affirmed by the Court of Appeals, 4 C. E. Green 457, this court, on a bill filed to set aside a negotiable note void for want of consideration, will retain the bill after answer, although the defence could be made at law. And if in this case, as by inference may be fairly taken from the answer, the property released was worth \$400 only, the note may be good as to that amount, and invalid as to the residue; and it would be more properly a subject of equity jurisdiction, as it can be declared void upon payment of that amount.

As to the sealed bill, the complainant has the right to have a discovery of the consideration, not on the ground that it would be void without consideration—a sealed bill is valid both at law and equity, without any consideration—but on the ground that the want of consideration, together with the imbecility of the intestate, and some undue influence used by the defendant in procuring its execution, might at law render the bill invalid, when the same degree of mental imbecility or exercise of influence would not affect its validity if given for a plain and acknowledged debt justly due from the intestate. That the answer denies the imbecility and the influence, though sufficient so far as they are concerned to dissolve the injunction, will not prevent the complainant from setting them up in the suit at law, nor will this court infer from such denial that the complainant cannot successfully sustain them in any degree. That denial is only of avail to dissolve the injunction so far as these matters are concerned, but does not take the defendants out of the rule requiring a full answer to every material equity of the bill before the injunction will be dissolved. Besides, it may appear if the true consideration of this sealed bill was disclosed, that it was given in lieu of, and as a substitute for, the note of \$3000, given to the defendant four weeks before, which the intestate might have supposed to be invalid in whole or in part. }

In the situation of this complainant, who finds that three sealed bills given by her husband to the children of his first

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wife, secretly and without her knowledge, with the promissory notes of which she had knowledge, will take from her and his children by her, one-half of his personal estate, she is entitled to a full disclosure of the consideration of these promissory notes, before she pays them or allows judgment at law to be obtained against her. The consideration may be usurious, or in other respects illegal, and she is entitled to know it, that she may plead and set up such illegality. If this sealed bill was obtained legally and without fraud, although without consideration, the defendants will be entitled to recover upon it, but in such case it would be an advancement by the intestate, which the complainant must bring into the hotch-pot before distributing the personal estate.

Besides, this is one of those cases in which the discretion of the court should be exercised in retaining the injunction until the final hearing of the cause. If these moneys should be recovered by, and paid to the defendant, the complainant could have no redress, although it should clearly appear on the final hearing of the cause, that the note and bill were illegal and void, while the injury to the defendants by the delay of the payment of money bearing interest cannot be very great.

The motion to dissolve must be denied with costs.

DERBY vs. DERBY.

1. A party who has negatively violated the marriage contract in its two most vital points, to love and to cherish, and has only performed it in the last and least, to support, comes into a court of equity with an ill grace to complain of a positive breach by the party whom he first injured.

2. A witness should not be allowed to have his direct testimony read to him before cross-examination. Such irregularity is not sufficient to suppress the testimony, but must almost destroy the credibility of the witness.

3. A written confession of adultery, formally sworn to before an author-

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ized officer, will have no weight as evidence when made under circumstances which compel the belief that it was not fairly obtained or understandingly made.

4. The testimony of a single witness may be sufficient proof of adultery to sustain a decree of divorce, though denied by the defendant upon oath. But such effect must depend upon the probability of the story, the character of the witness, and consistency of his evidence, and perhaps somewhat on the character of the defendant.

This cause was argued on the final hearing upon bill, answer, replication, and proofs.

Mr. A. S. Jackson and *Mr. C. Parker*, for complainant.

Mr. W. B. Williams and *Mr. Dixon*, for defendant.

THE CHANCELLOR.

The complainant asks for a divorce from the defendant on the ground of adultery committed by her. The bill charges two acts of adultery, both with William D. Palmer; the first on the steamboat *Dean Richmond*, on the Hudson river, on the 22d of August, 1866; the second at the house No. 53 Houston street, in the city of New York, on the 27th day of October, in the same year.

The answer denies these charges, and denies that she ever committed adultery with any one. And it further charges that the complainant has at divers times since his marriage with her, committed adultery with Margaret Burst and with Margaret Morrow, otherwise called Margaret Marshall, and with other women whose names were unknown to the defendant.

The parties were married at Jersey City, November 14th, 1854, and have since resided in this state. They have had three children, one of whom, a son, born about 1861, is still living; the two others have died; since June, 1865, the parties have not resided together in the same house. The complainant, who is one of a firm of large lumber dealers in Jersey City, has resided at the principal hotel in that city,

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in which he has had apartments. The defendant, with her son, has resided with her mother, at the town of Bergen, about two miles from this hotel. The complainant supported the defendant and his son, and the parties were apparently on amicable terms, visiting each other, and part of the time he called almost daily to see the defendant. He never remained all night, and only once since June, 1865, had marital intercourse with his wife : this was in June 1866, on a visit to her at her room in her mother's house.

In the year 1862 they were living apart : he was for some months boarding with James H. Burst, in Jersey City, in a house which belonged to, or had been hired by the complainant, and the use of which was given to Burst in part compensation for board. The defendant did not board with him, except for about three weeks of the time. The sister of the complainant, a young woman of twenty-six, who was in delicate health, boarded with him. Martha Burst, the sister of James H. Burst, a young woman of nineteen, was one of the family. The complainant was very attentive to Martha Burst : was much with her : he often walked out with her, and escorted her to places of public amusement to which he invited her. He made her presents, one of which was two dresses. She met him in New York, as if by appointment. Her brother, who denies belief of anything criminal in this intercourse, thought that it was indiscreet in her, and might cause scandal, and interfered with both, separately, and endeavored to restrain it. Both resented his interference, and the result was that Burst and his family left the complainant's house. The complainant was for several years in the habit of meeting Martha Burst, and several other girls, who, like her, maintained themselves by sewing, embroidery, or like occupations, at the rooms of the Fidelity Division of the Sons of Temperance, and at their excursions ; to neither of these his wife was admitted, she not being a member of the Division. On these occasions he would devote himself for a season to one, and then, for another period to another of the girls who were members,

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and in need of escort and attendance. This was done in such a manner as to attract the observation of others.

The defendant, at her marriage, was about twenty-one years of age, and had before been a teacher in the principal public school in Jersey City. A large number of witnesses who had known her for years, both before and since her marriage, testify that both her conduct and reputation for modesty and chastity, has always been beyond suspicion and without reproach, before these charges now made by her husband. Several testify that she was a fond and submissive wife, always anxious to please her husband and sacrificing everything to his wishes. And her conduct in quietly submitting to the mode of life to which he subjected her, would seem strongly to confirm this testimony.

The complainant, for more than a year before the injury of which he complains, had, in effect, deserted his wife, and neglected or omitted the main duties and obligations of the contract of marriage, of the breach of which he now complains. He indeed supported her and visited her, but he separated himself from her society and the enjoyment of a common home. His leisure and amusements were shared with others, and he denied the marital rights which, by every principle of law or duty, he was bound to yield. Neither his means or his business prevented him from allowing her to share his apartments with him and their only child, or from maintaining a common home at the place to which he had exiled her. There is no reason for this conduct shown, and it was his duty in presenting himself before the court for relief, to have shown, if practicable, that his conduct in this respect was not without excuse. His gallantry and attentions to a few of the female members of the Fidelity Division, might have been accounted for and excused by their common devotion to the important cause of temperance reform, if it had not been accompanied or followed by a total neglect of his duties to his wife. The neglect of a husband to perform his duties to his wife, although it may be a natural and the real cause of her infidelity, will not

in which he has a son, has resided about two miles from the defendant on amicable terms. He called upon her, remained all night, and a marital intercourse took place. He made a visit to her, &c.

In the year 1865, six months before the house which the complainant and defendant occupied was sold to him, except of the except in delicate health, sister of J. one of the Martha B. with her, which he was two days ment. He, for the purpose of coming down on in this case, it her object was to watch her husband and might have been informed, generally was accompanied by a man. The false pretence was used because left the house to her husband's sister her real object, several years ago did not find her husband, but found on the several occasions a man whom she had known, and whose sewing-machine; that he procured a state-room for her, Fidelity, and other articles to it for her, but did not stay all night, or any considerable time, but the morning before she had left it, and took out for her.

the part of the complainant, if it is

late the crime. But a solemn contract in it, and has only per- port, comes into a court of a positive breach. His hands are not apply if he had committed weakened, blanched, and lace, that they take but altar of justice. Such a favorable leaning of the court many reasonable doubt.

the defendant is upon the from Albany to New York, August, 1866. The defendant Rhinecliff, on the Hudson, at a whose wife was the complainant charges that she left the hotel to New York, when she really to Albany to meet W. D. Palmer, a man with him, and that state-room with Palmer, and there she admits that she left the hotel for the purpose of coming down on it her object was to watch her husband and might have been informed, generally was accompanied by a man. The false pretence was used because left the house to her husband's sister her real object, several years ago did not find her husband, but found on the several occasions a man whom she had known, and whose sewing-machine; that he procured a state-room for her, Fidelity, and other articles to it for her, but did not stay all night, or any considerable time, but the morning before she had left it, and took out for her.

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entitled to be received and believed, shows a state of facts entirely different, and such as can leave no doubt of her guilt. The great question is as to the weight to be given to this evidence.

Palmer was a partner or clerk in a firm which occupied the second floor of the store No. 53 Chambers street, New York. He, with his wife, had boarded with a Mrs. Love-land, at No. 40 or 140 Barrow street, Jersey City, a place between and about equi-distant from the rooms of the complainant and Clifton Place, in Bergen, where the defendant lived. The defendant had visited Mrs. Palmer in Barrow street; this is shown by Horace A. Crandall, a nephew of the complainant, and the book-keeper of his firm, called by him as a witness. Palmer had been once or twice that summer at Rhinecliff Hotel. At one of these visits he staid all night, and about seven o'clock tapped at the door of the defendant's room and went in, in presence of a chambermaid at work on the stairs, but under circumstances in which no crime or even impropriety can be inferred. He had sent a note informing the defendant of this intended visit, which was abstracted from her trunk by Mrs. Crandall, at the complainant's request, and is in evidence. I see nothing in this note indicating any impropriety, except by putting upon certain expressions a fanciful meaning, which there is no warrant for doing. No other, not the slightest impropriety of conduct of the defendant with Palmer or any one else, is shown to have occurred by any evidence in the cause. An envelope not used, directed in his own hand writing to Palmer, at the Delavan House, Albany, was found in her trunk, and taken out by Mrs. Crandall with the letter. But this can as well be accounted for by an intention to communicate with Palmer when there, as to her husband's movements, as to communicate with regard to her own or Palmer's movements. She would hardly have left these papers, if the instruments of her own crime, in an open trunk, subject to the inspection of her husband, who visited the Rhinecliff Hotel, and always open to the scrutiny of his sister.

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With this previous character of the defendant, this history of her acquaintance with Mr. Palmer, we come to the evidence of the adultery on the Dean Richmond.

The testimony which I will first examine is that of Sarah L. Penny, at the time Sarah L. Morrow; she has since married; she was a cousin of the defendant. She, at the request of the defendant, about August 20th, asked defendant in presence of Mrs. Crandall, to accompany her to New York. This was done lest Mrs. Crandall or her daughter should offer to accompany her, and so frustrate the object in view. It was understood between the witness and the defendant, that they should go together to the next station south, when defendant should get out, and alone take the up train to Albany to meet some one on board the night boat, whose name she did not tell. She says now, it was to meet her husband unawares. Defendant and Sarah met the next day at Desbrosses Street Ferry, as they had agreed, and came over to Jersey City, found the complainant, who got a carriage and drove them to her mother's. At this meeting, or some time after, Sarah Penny says the defendant told her that the man she went to meet was Mr. Palmer. That she was afraid Derby should know it. She said there was no harm in it, but if Derby knew it he would want a divorce. That Palmer had taken the state room in Derby's name, and remained in her state room quite late. Derby took his wife and Sarah Penny back to Rhinecliff on Saturday, the 25th, and during these two days or at some other time, the witness is not able to recollect which, she told to Derby, who inquired particularly where his wife had been, and how she came down, the story which the defendant had told her, and was anxious to conceal from Derby. In that conversation with Derby, which was in the street in Jersey City, or shortly afterwards, he gave her \$15 in money. She afterwards, under cross-examination, says that the conversation with Mrs. Derby, (and she had but one) was on the 24th, at her mother's. "She said, she met a gentleman and came down with him, and that he took the state-room in Mr.

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Derby's name; *I don't exactly remember the rest of the conversation;*" yet she goes on to say, "she said she did not think there was actual harm in what she did," and then proceeds as if she did recollect. This differs entirely from the story in the direct examination, which is that the defendant had told her the name of the person she was going to meet. That she met a gentleman who took her to supper, and got a state-room for her, is entirely a different story, and with a different effect on the question, from the story that the gentleman she went to meet was Palmer. The one story supports the defendant's theory, the other that of the complainant. The whole effect of the testimony of this witness depends upon her recollecting the words used by the defendant. If she afterwards, from talking with Derby and others, drew a conclusion as to what the affair was, she would naturally construe this conversation to support it, and in fault of recollecting the words, would and might honestly use such as would express that meaning. I cannot believe that the witness recollects the words of that conversation with Mrs. Derby with sufficient accuracy to make it a credible confession of guilt. I am more inclined to believe the statement, "I don't exactly remember the rest of the conversation," than anything which she has sworn to. The testimony of this witness is open to further observations on her want of recollection and of accuracy, and the history which she gives of her own life. But the reasons which I have mentioned are sufficient to prevent any determination founded on her testimony.

The next testimony which I shall consider is that of John B. Sevar. I shall not comment at length on his evidence; I do not think it possible that any one accustomed to deal with evidence, upon reading his testimony, can place any reliance upon it. The highly improper course pursued by the complainant, and permitted by the examiner, of requiring his direct testimony to be read to him before the commencement of the cross-examination, shows that the complainant placed no reliance upon his statement of facts from his recol-

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...ferred, though he might rely
...ments of what he had before
...g. The irregularity is not suffi-
...satisfactory, but in case of such a wit-
...credibility.

...the defendant by sight from dining
...table with her at the Rhinecliff
...know her name or her husband, or
...her husband or not, took a seat in the
...table where he was engaged in read-
...Victor Hugo, and was in the midst of
...ception of the battle of Waterloo, yet
...the fact, that these two went to a state-
...at nine o'clock, and that neither came out
...while he sat there, and noticed that there
...the lock inside. He was so struck with
...that he sometime afterwards *happened* to men-
...titioner who *happened* to be E. G. Waters, of
...whom Mr. Derby had employed to collect
...his wife.

...witness to the steamboat charge, is Thomas
...before this time he knew Derby by sight, and had
...Derby with him and knew her as his wife. He
...the boat in company with a stranger to him,
...knew was not her husband. He lived in Brooklyn,
...come over in Jersey City, at Taylor's Hotel, where
...in Derby, but does not know whether Derby knew
...before he had seen either of them go to the state-
...far as appears, he went down to the clerk's office,
...told who occupied room 112, and was answered
...After this he took a seat in the saloon and was
...Harper's Magazine; he continued there from half-
...eight to eleven o'clock, when he went to his state-room.
...that Mrs. Derby, and the man with her, went into
...the state-room 112, together, between nine and ten o'clock,
...that he did not see either of them come out, and that he
...that he should have noticed it if either had come out.

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The testimony of this witness is entitled to consideration, though a stranger, about whom not much, if anything, is known; nothing is shown against his character; his manner seems that of a person desiring to tell the truth; the only doubt is whether the accuracy of his recollection is to be relied on. He took little interest in the event; although the only place to which he appears to have resorted in Jersey City was Taylor's Hotel, where Derby lived, he did not mention the matter to him until some eight months afterwards, when he heard others talking of it about the hotel. In eight months the recollection is much impaired, and the value of his evidence depends upon accuracy of recollection and the closeness of his observation. When the matter became serious he would naturally imagine that he had given it close observation at the time. Now, if the proof was that Palmer had gone into the state-room with Mrs. Derby and stayed there a few minutes or even half an hour, this alone, in the absence of all proof of any previous intercourse or conduct of a suspicious nature, would not raise a violent or even a strong presumption of guilt. Continuing all night would leave no doubt, and staying for an hour and a half, would raise a strong presumption. Now, whether he would with certainty have noticed his coming out a few minutes after entering, is a question upon which the court can judge as well as the witness. He says he thinks he would have noticed it. But if he was at all interested in his reading, it is very possible that Palmer might have gone out, and that in the bustle of the large number of passengers going in and out of these rooms at this hour of the night, he might not have noticed it. I am not willing to adjudge the defendant guilty upon this evidence, when the whole value of it depends upon the degree of attention paid by Brown. It is strange that a horse dealer, with a horse below upon the boat, would sit in that most uninteresting of places, the saloon of a steamboat, reading Harper from half-past eight or half-past nine to eleven o'clock in an evening, in the hot month of August, and not stir out to breathe the cool air or

But

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upon his recollection
sworn to from a
cient to suppress
ness must abate

This witness
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House,
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It

that he went to inquire
and not after he saw them
or that the mere presence
he knew, be a brother, or
white his watchfulness over a
in the absence of any conduct
Samuel P. Jones, of Oneida, New
York, who was on this steamboat with a
friend, who knew either of the parties, except that
with a friend in Palmer's shoe store, at 53
he had seen Palmer selling goods, and
He saw Palmer with a lady who proved
Mrs. Derby, at the supper table, and noticed them
know but she was Palmer's wife. The next
at six o'clock, the time of landing at New York, he
the upper saloon, where he had been for one hour or
an hour and a half, "reading and taking notes generally."
noticed Palmer come out of a state-room, and in a few
minutes after he saw the lady come out. This fact, which is
an ordinary occurrence on these boats, for some reason unac-
counted for, struck him as remarkable. Jones told this
story to a friend who told it to Waters, and Waters sent
Jones to Clifton Place, with a letter addressed to Mrs.
Derby: she came to the door, and he recognised her to be
the woman. His story is a congeries of improbabilities so
evidently got up for the occasion, that it merits no other
remark. If it were otherwise, there is nothing in it to con-
tradict the evidence of Mrs. Derby, who says that Palmer
came into her room in the morning before she went out, and
stayed some minutes, assisting her in getting ready to go out.
Jones does not pretend that he watched this door for fifteen
minutes before any one came out, and that in the bustle and
activity in a steamboat saloon, at the hour of landing, no one
could have gone in without his noticing it.

But there is other evidence to sustain this charge, of a
kind entirely different, and not liable to any of the objection

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taken to these four witnesses. It is the written confession of the defendant herself, not only signed by her, but sworn to before a master of this court. It was written and read to her by her husband, and again read by the master before she signed it. And he testifies that he cautioned her against signing or swearing to it if the contents were not true. This confession does not admit her guilt, but it admits that she met Palmer on the Dean Richmond by appointment; that Palmer took a state-room in the name of Mr. Derby, and that they both occupied it during the night. These facts are sufficient to sustain the charge of adultery. While it is possible that a man and woman of their ages may occupy the same room for a night without guilt, yet the presumption is strong against them, and in this court, it would, unless clearly explained, be always sufficient to sustain the charge. It is not usual to grant a divorce on a charge of adultery sustained by the confession of the defendant alone. *Miller v. Miller*, 1 *Green's Ch.* 139. But in this case it is shown that she left the Rhinecliff House under a false pretence to avoid the suspicion and interference of her husband's sister; that Palmer had twice visited her there and had opportunity to make the arrangement; that he waited on her on the boat, took the state-room for her, and was in it the next morning with her alone before her leaving it. These facts, if the confession is believed to have been fairly obtained and understandingly made, are sufficient to support it, so that this court may found its judgment upon it.

Her oath annexed to this confession neither adds to, nor detracts from, its weight. It was unwarranted and perhaps indiscreet for the counsel of the complainant to administer this unofficial oath. But it was natural, in his zeal for his client, who had five months before consulted him about this matter, that he should endeavor to make the admission as strong as possible. The defendant, while she admits her signature to the confession and to the affidavit, and that it was read to her, states in her testimony that it was made under these circumstances: That her husband on that day,

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February 4th, 1867, sent for her to his office, showed her some New York bills of her contracting that he had received, gave her money to pay them, and asked her when she came back to meet him at his rooms at Taylor's Hotel; that she met him there, when having locked the door, he read to her this paper, prepared in his own handwriting; that she objected to the parts which stated that she met Palmer by agreement, and that they occupied the same state-room, and said to him, "Oh no, Will, that is not so." He replied that that was no matter, that Jackson (his counsel) said *that* could be without any criminal transaction; that he wanted her to sign the paper, and told her that he would hire a house and go to housekeeping with her; that she should retain her child, and that if she would sign, he would drive her home himself, and that would stop the scandal about the museum; (referring to an occurrence at Barnum's Museum a few months previous, when he came in with a strange woman, in his wife's presence, and when he found his wife was there the woman abruptly left, and he showed strong symptoms of agitation and irritation). That she was agitated and excited, and was willing to do anything to please her husband, and have his approval; that her husband went for Jackson, and locked her in his room until he returned. She admits that Jackson asked her if she signed without fear of her husband, but not that he read it or explained the contents. The defendant's account of what took place after Jackson came, differs in some material respects from the account given by him. As to these, preference must certainly be given to the testimony of Jackson, who is known as a counsellor of this court, of highly respectable standing. Yet some allowances must be made for him. The same ardor that when Derby requested him to take the acknowledgment of Mrs. Derby to this paper impelled him to substitute an affidavit, which he must have known was irregular and unauthorized, would now, in relating occurrences of two years since, insensibly influence his memory to recollect the occur-

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ence in the light most favorable to his client, and the cause he has so zealously espoused.

We will take Jackson's statement as literally true, that as soon as he had read to her so much of the paper as made him aware of its nature, he ordered Derby out of the room, and read the whole carefully to her, cautioned her not to sign it, if the facts were not true, and that he chivalrously offered to stand between her and her husband's wrath, if she did not sign it; and then examine her evidence. What occurred before Jackson came, no one discloses but herself. Her husband, the only other person present, in this, as in all other matters in this cause, is not offered as a witness. If what she states is true, that she plainly told her husband that the two only important facts in this paper were not so, and that he replied they were of no consequence, and she then signed it to please and pacify him, the confession is of little or no value in this cause. She is a competent witness; her character for veracity is not impeached, nor is her character for chastity, except by the two charges under investigation; she indeed has a great interest in this cause, and in this very question. But it is in such cases that character is of value, and must be brought into account, and this testimony by her must be taken into consideration, unless it is improbable of itself, or overcome by other proof. Jackson's testimony is of value to show that she was fully cautioned not to sign, if the facts were not true. Married women, we all know constantly sign deeds against their judgment and wishes, only to gratify the requests of their husbands, and to avoid the discomfort and annoyance which a refusal would cause, and solemnly acknowledge before an officer on a private examination, that it is done of their own free will. The step taken by Mrs. Derby was only one degree beyond this, and that consisted in this, that she did not only part with property, but acknowledge facts which might disgrace and ruin her for life. But if she did this under the assurance that the facts admitted did not compromise her, she might have done so. Yet it is an acknowledgment that few women

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in their senses would have made if not true. And in order to believe it in her case, it is necessary to be first convinced that she was, by the difference in their nature, or by circumstances, under the control of her husband. From the facts in the case, the conclusion is unavoidable, that she was not a resolute, strong minded woman, but of a yielding, unresisting nature. She never else could have borne the treatment to which for years she has been subjected by her husband.

On the other hand, Derby appears to be a man of decided will; strong, resolute, and violent; and knows the value of energy and violent attitude in overruling more timid minds. His resistance to the remonstrances of James H. Burst, and above all his two letters to him, couched in the strongest language, and filled with invective and outrageous threats, show this character. He was abusing and threatening a man who had been doing only what his duty clearly required of him, trying to break off an intimacy between Derby and his sister, a girl of nineteen, which, to give it the best character, was indiscreet, dangerous, and calculated to destroy her reputation, and which in the end did effectually destroy it, whatever may be the fact with regard to her actual guilt. His violence succeeded in driving away a brother's protection, and ensuring a continuation of the intimacy. Such a will and temper was well adapted to operate upon the yielding nature of his wife, and to compel her to submit, as she had always done, to anything he might dictate.

Her situation, too, with regard to this trip, was calculated to constrain her. She had taken a bold step for a timid woman; she had gone to Albany to watch her suspected husband; she had left his sister's house under false and feigned pretences; she had met Palmer, who had waited on her, and whom she had, without doubt, taken into her confidence as to her object; he had been in her room alone with her. Her confidant had betrayed her, and had accepted fifteen pieces of silver from Derby. To tell him the truth would rouse him; the scene at the museum had exasperated him; and the life of quiet neglect to which she had become accus-

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tomed, might have come to an end. His promise of a home with him and her child, and to drive her home himself, and put an end to the scandal, which at least he performed, were calculated to have an effect upon her. The only way to accomplish this end, was to perform the condition, and resolutely to sign the paper in disregard of Jackson's kind advice and admonitions, and of her own knowledge of the falsity of the facts. I can readily conceive that this view presented itself, and it will reconcile her story with Jackson's, except in the details. These I do not believe she could recollect with accuracy, even if Jackson can.

The manner in which the paper was presented, and the signature obtained, are much against it. It was prepared in her absence, without her being asked or consulted about it. She was summoned in his room to execute it without knowing for what object her presence was required. The paper was in her husband's handwriting. She was urged by him to sign it, in a room locked up with him alone; she was without friend or counsel. Here the promises and inducements were offered, and she was kept locked up while he went for his counsel. These things are not denied. Confessions of a criminal under such circumstances are never even considered. In *Miller v. Miller*, 1 *Green's Ch.* 139, this court disregarded a confession, because it inferred from the general conduct of the husband that it was made through fear.

The common law and the law of this court, make great allowance, and justly, for the influence of a husband over his wife. She cannot be convicted of a plain larceny committed in his presence. If she signs and swears to an answer in Chancery, together with her husband, it can never be used as evidence against her, whatever may be its effect as a pleading in the suit. And this is so, however lawful the oath and indifferent the master.

This is not authority for rejecting this confession as evidence, but these principles must be kept in mind in determining the weight to be given to it. I am constrained to

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conclude that this paper was obtained from the defendant under circumstances which should give it no weight as evidence in this cause: and it fails to convince me of this adultery.

In my judgment, the adultery on the Dean Richmond is not sufficiently proved to be made the ground of a decree of divorce.

The other specification in the bill, is the charge of adultery on the 27th of October, 1866, with Palmer, at No. 53 Houston street, in the city of New York. The proof of this is by William P. Prentice: he deposes that on that day, at the complainant's request, he followed the defendant from Jersey City to New York: that she first went to Palmer's store, 53 Chambers street, and in fifteen minutes came out with Palmer: that they walked to Broadway, and up Broadway to White street, then got in a Broadway omnibus and rode up to Bleeker street, walked down Bleeker to Wooster, down Wooster to Houston, and down Houston to No. 53, a notorious house of assignation, or bed-house, into which they went, and remained for an hour and a half. He followed them there on foot when they walked, and rode on the omnibus when they rode: he stood on the opposite side of the street while they were in the house, and learned from a negro living in Houston street, and from a policeman, the character of the house. Palmer came out first: he followed him up to Broadway, then returned to his station. In about a quarter of an hour Mrs. Derby came out: he followed her home: she went up Broadway, stopped at 704 and 744, took the Bleeker street stage to the Cortlandt Street Ferry, and crossed at that ferry: it was about half-past one when she went over, and about half-past four or five o'clock when she returned. The character of the house, 53 Houston street, is shown by a witness, who was a policeman in that ward from 1864 to 1867. It was a notorious house for prostitution to which men and women openly resorted by night and by day for that purpose. It had been kept for years by a violent intemperate woman, known to the police as Irish Mag; she

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kept no girls, but let a room and bed, for about a dollar, to any who desired to use them.

These facts if true are sufficient to establish the adultery; going to a house of that character with Palmer, remaining there the length of time stated, and going out separately in different directions, are circumstances that must compel any court to infer adultery, unless unmistakably explained by clear and credible testimony. The witness to the facts is Prentice; his testimony is positively denied by the defendant, and he is supported by no one, for the fact proved by Crandall that on that day he saw her and Palmer come out of Palmer's store and walk to Broadway, is an innocent one, and in no way tends to establish guilt. She admits that she called more than once at Palmer's store, and that he came out with her. But Prentice is a disinterested witness, and Mrs. Derby, though by law a competent witness, is directly and strongly interested in the result, and the charge is one which, above all others, would tempt to perjury in denial.

Courts of divorce were loth to grant a divorce for adultery on a charge sustained only by a single witness, without any corroboration or any circumstances rendering it probable, even when the defendant did not and could not deny the charge under oath. A denial under oath by the party subject to full cross-examination, must have some weight given to it. Yet I am not willing to hold that an act of adultery, or facts from which adultery must be inferred, when positively sworn to by one witness only, will not in any case be sufficient proof to sustain a decree of divorce, because denied by the defendant upon oath. In such case the conclusion must depend upon the probability of the story, the character of the witness, and consistency of his evidence, and perhaps somewhat on the character of the defendant.

The charge is, that a woman of good character, a wife and a mother, about two o'clock, in the midst of business hours, on Saturday, in the month of October, went into a store in one of the most respectable and frequented parts of the city, a few doors from the great store of A. T. Stewart & Co.,

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when customers and other members of the firm were probably there, and in fifteen minutes took out a partner or salesman, a man against whose character nothing is shown, who had for many years been engaged in a respectable business, and that they proceeded walking and riding up Broadway at the hours when most thronged, openly and side by side, and went down Blecker street and entered together a low, notorious bed-house, whose character was well known to the police, and to the residents of the vicinage. If both were depraved at the core, yet a slight regard to decency, or for that external reputation which both had hitherto kept up, or a very little reflection or common sense, would have suggested a different course to accomplish their object. The danger of being followed and watched, as they actually were by Prentice, would have suggested itself, even taking for granted that both were too much engrossed in the object in view to recognize Prentice, known to Palmer as the conductor of a street car in Jersey City, in which he used to ride the year before, and whom Mrs. Derby had seen working in her husband's lumber yard. The story is possible, but it seems to me very extraordinary and improbable.

Again: Prentice, when recalled, fixes the day as the 20th of October; in this, varying from the specification of the bill and the day stated in his first evidence, and in such way that the 20th must be taken as the day, or Prentice wholly discredited. Mrs. Crandall, the sister of the complainant says that Mrs. Derby left the Rhinecliff House on that day that she was there from July 20th to October 20th. Now it is possible that Mrs. Derby, by taking an early train might have arrived at New York in time to have gone to her mother's at Clifton Place, and deposited her child and luggage, and returned to Jersey City in time to cross the ferry at half past one. Yet we must believe that under that quiet, retiring demeanor, which so many of the witnesses took for an index of her modesty and chastity, there lurked fierce passion, of which she had now lost control, to urge her with such hot haste to rush to the store of her paramour

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seize on him in a few minutes and hurry him to the scene of her dishonor. This supposition is possible but very improbable.

The history of the witness, Prentice, does not much commend him. He was, at the examination in 1868, twenty-two years old, had no trade, and was not well enough to work. He was living with a cousin in Franklin, Connecticut, and kept his trunk and clothes at his sister's, at Norwich, in that state; he had worked at the cigar business, in the screw factory, and at complainant's lumber yard, and, I think, had been in the army. He had been a conductor on the Grand street horse car; he had been confined in the Hudson county jail, for what does not appear, and he was a brother of one of Derby's partners. There is nothing in all this directly against his credibility or veracity, yet this history fails to indicate a person of that high toned character whose testimony will, some time, induce or compel belief of things very improbable in themselves.

This witness, when first examined, stated that the time was October 27th; that he made a memorandum of the date and gave it to Mr. Derby, adding, that he had a very good memory for dates, for a particular thing like that. The day in the bill is stated on the 27th, as if Derby or Jackson had taken it from that memorandum. Jackson swears that Derby had consulted him about the divorce before this; and it would seem that if Derby would keep a memorandum of any date he would of this; and that the date on which he traced his wife with her paramour to such a house, would have been burned upon his memory. This witness was not cross-examined. But more than seven months afterwards, on the day when Crandall was examined, who testified that the day he saw Palmer and Mrs. Derby, was October 20th, Prentice was recalled by the complainant to testify that he had made a mistake in the date; that the real date was the 20th; that he had made a memorandum of the occurrence on the day at his brother's house, in his pocket diary; that the book had been since in his trunk, at

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his sister's house, at Norwich, and that he got hold of after his first examination; he produced the book, a diary for 1866, in which a memorandum is made, covering the spaces from October 20th to October 27th, inclusive, giving the history in nearly the same language and order as in the first examination, including the numbers 704 and 744. The similarity is so great as to give ground to the suspicion that one was taken from the other. And it is strange that a witness, who could not, without his memorandum, remember a single date, which, to him, seemed important, and which he volunteered the assertion that he had a very good memory, could, without a memorandum, recollect two strange numbers, associated with nothing; and although, according to this corrected testimony, he and Crandall must have been in Chambers street, at the same place, in front of No. 53, the same time when Mrs. Derby and Palmer came out, they do not appear to have seen or recognized each other. Although Crandall told Derby on the same day what he had seen, and at Derby's request made a memorandum, yet destroyed that memorandum before he was sworn. As to Derby, who, if there is any truth in Prentice, must have been struck with the remark of Crandall when he received the report of Prentice that night, does not appear to have mentioned or made known to either the coincidence.

And there is a discrepancy between the memorandum and the testimony of this witness worthy of attention. In his testimony he states, "that on the 27th, I saw her pass Taylor's Hotel, in Jersey City, she was going towards the ferry. I saw Derby right afterwards coming down the street, and asked me to follow her to New York." The memorandum states, "I saw Derby at Taylor's Hotel, he asked me to follow his wife, that she was coming down to the ferry." These accounts of the beginning of this affair are so essentially different in features that would attract the attention of a speaking *from memory*, that the mistake would not be made; it might, in the effort to recollect a fictitious memorandum. Memory would not confound a request made

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Derby standing at the hotel to follow his wife, who would soon come down the street, with one made by Derby coming down the street to the witness after he had seen Mrs. Derby go toward the ferry. Neither the character of this witness, nor the consistency of his testimony, are such as to sustain the extraordinary and improbable story told by him. Besides these views, the conduct of the complainant throws discredit on the testimony as to both these charges. It shows that he did not believe it himself.

The scene in Barnum's Museum was in November, 1866, a few weeks after the alleged Houston street affair. Derby had just caught his wife in a low, disgraceful, outrageous, act of incontinence. He must have been burning with shame and indignation at her conduct. His offence at the museum was apparently only accompanying a strange woman instead of his wife, yet the known and discovered guilt of his wife gave him no confidence to face her, his companion instantly disappeared when she saw they were noticed, and to his wife's moderate but decided reproach, he simply replied "don't make a damned fool of yourself," and made no allusion to her own deeper guilt. He went next morning to explain to her and her friend, Mrs. Anness, who was with her, saying it was an innocent young girl from the country, with whose mother he had boarded, and to whom he had promised to show the sights of the city. Mrs. Anness, who boarded with Mrs. Derby's mother from October, 1866, to May, 1867, and who must have been there at or just after the Houston street charge, says, he generally called there every morning. This conduct, in both respects, is entirely inconsistent with his belief in the story told by Prentice.

Again: the fact that Derby did not commence proceedings for eighteen months after the discovery of this conduct, and for more than a year after the confession, and not until after the death of Palmer, shows that he had no confidence in this evidence, or that he could succeed upon it until Palmer was dead. Palmer died in February, 1868; in March, Derby

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gave positive orders to his solicitor to proceed, and on April 3d. the bill was filed.

The reasons for the delay attempted to be given through Jackson, are not satisfactory. The nice conscientious scruples may have influenced his counsel, but would not for a moment have been in the way of a man with force and will and temper to write the two letters to Burst. Besides, Jackson at last only put the delay on the ground that he should wait until he had sufficient proof; and if he believed the story of Prentice, or relied on the confession he had procured from his wife, he had ample proof after either.

This conclusion as to the charges against Mrs. Derby will relieve me from reviewing, at any great length, the charges of adultery by Derby, alleged in the answer by way of bar to the divorce.

The first charge is of adultery with Martha Burst. I consider this fully sustained by the proof; and that, without the aid of the rule adopted by the Ecclesiastical Court of England that the same fullness and cogency of proof will not be required to sustain adultery when pleaded in bar, as when alleged as the ground for the divorce. *Forster v. Forster*, 1 Hagg. Cons. R. 144; *Astley v. Astley*, 1 Hagg. Eccl. R. 714; *Bishop on Marr. and Div.*, § 398.

Martha Burst, when nineteen, had received the attentions of Derby in his wife's absence, had accepted presents of value from him, had gone out with him at night, and the matter proceeded so far as to cause much scandal. Her brother, who had confidence in her virtue, but not in her prudence, interfered. Both she and Derby resented this interference. She left her brother on pretence of going west, and came back to Jersey City and took board elsewhere, with strangers. The intimacy continued; the scandal grew. In June, 1864, Mrs. Hoagland, who had for many years kept a boarding-house in Grand street, and with whom she had boarded for more than a year, sent her away on account of the scandal. For some time before, the lady boarders in the house, for the same reason, had ceased to associate with her. When sent away she said nothing in her own defence, but

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remonstrated against her brother attempting to control her conduct. Derby's business called him to Albany to buy lumber, and she had been seen at New York in the morning coming off a night boat from Albany, in company with Derby. Both she and Derby knew of the reports, of the opposition of her brother, and of her expulsion from the boarding-house. Yet, in the fall of 1864 we find Derby going up to Albany on the Saturday night boat; in the morning he met two young women from Jersey City; before he left the boat acquaintances of Martha Burst, he told them that she was staying at Albany; she was staying there temporarily with a friend, Mr. Romaine, whom she had visited several times before. Derby asked these ladies (two sisters, named Rodier,) if they would like to see her: at a note from him she came to the Delevan House, where all three had put up. After mid-day, or after Mr. Romaine's dinner, Miss Albina Rodier went with her to Mr. Romaine's. stayed a few hours, and when they left she told Mr. Romaine that she would not be back that night, but not in the hearing of Miss Rodier. She returned with Miss Rodier to the Delavan House, took tea, and Mr. Derby spent part of the evening with them; before eight o'clock she left, stating that she was going home; Derby offered to accompany her, and left with her. She did not go home to Romaine's that night. Miss Rodier saw nothing of either of them until next morning just before seven o'clock; Derby came first to the room occupied by her and her sister, ostensibly to inquire about their going to Troy; Martha Burst came in just after this, with her hair uncombed, and dressed in the same clothes she had worn the day before. She made some apology for her hair, and stayed to breakfast with them. In the meantime the room of Derby, which had been given to him on Sunday morning, next that of the Rodiers, on the second floor, had been changed for one on the third floor.

These facts, unexplained, lead irresistibly to the conclusion that Derby was guilty of adultery that night with Martha Burst. He had no other business at Albany on Sunday; he could not buy lumber until Monday; he knew Martha was

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at Albany, which shows guilty understanding. He adroitly used the presence of the Rodiers as an excuse to get her to the hotel; she came at once—it showed her willingness. She deceived the Rodiers by the pretence of going home, having artfully concealed the declaration made to Romaine, and went off with Derby, alone, and returned the next morning in just such manner as is consistent with her having spent the night in his room. The intention and determination of both is sufficiently proved, and the opportunity to indulge was ample. She may have gone elsewhere, but in a subsequent conversation with Miss Rodier about this affair, she insisted that she went back to Romaine's, which it is clear she did not do.

His unsuccessful solicitation of Mrs. Vanderbeck, clearly proved, shows his disposition to be faithless to his marriage vows. Such repulsed solicitation by a complainant is not, of itself, a bar to a divorce, as was at one time intimated in the English courts; but it will support evidence, otherwise insufficient, of adultery with another. A disposition by Joseph would have made it easy for Potiphar to convict his wife of adultery committed with one less scrupulous.

These circumstances are not conclusive; they may be explained, but until explained, there is but one inference. No explanation is given. Either Martha Burst or Derby could explain them, if an explanation could be given. Both are silent. If innocent, Derby owed it to her and to her reputation to call upon her to give the explanation. She is alive, and her residence is known; her testimony could be easily procured. As the case stands, but one conclusion is possible.

The testimony is not sufficient to sustain the charge of his adultery with Margaret Morrow, now called Margaret Otis. And although there is cogent proof as to the charge with Jenny Fauselman, yet it is somewhat contradictory; and as that charge is not set up in the answer, and as it is not necessary for the determination of the cause to review it, I shall not give it any further consideration.

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1. Unsupported evidence by an alleged paramour as to a wife's ante-nuptial incontinence, is insufficient to overcome her positive denial. Even if fully proved, such incontinence would be no foundation for a divorce, nor admissible to support proof of her subsequent adultery.

2. A husband who connives at or assents to adultery by his wife with one person, will be deemed as assenting to it with others, and will not be entitled to a divorce for a subsequent act of adultery with a different person. It will not affect the case, that the act of adultery at which the husband connived was not committed.

3. If a husband sees what a reasonable man could not see without alarm, or if he knows that his wife has been guilty of ante-nuptial incontinence, or if he has himself seduced her before marriage, he is called upon to exercise peculiar vigilance and care over her, and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the result.

4. He is not discharged from the exercise of such vigilance by the fact of his having deserted his wife and all his marital obligations for three years, or his having obtained a divorce in another state. If the marriage relation exists in this state, so that he can complain of a violation of its obligations, he cannot claim advantage of his wife's incontinence, when caution on his part would have prevented it.

Quære. Whether desertion for three years, under circumstances which entitled the defendant to a divorce before the commencement of complainant's suit, and before any adultery proved against defendant, would bar the complainant.

This cause came on for final hearing, upon the pleadings and proofs.

Mr. Keasbey, for complainant.

THE CHANCELLOR.

The bill states that the complainant was married to the defendant, his wife, in Newark, June 13th, 1864; that he was under twenty, and she eighteen years of age; that he was compelled by the father of the defendant to marry her, on account of his previous illicit intercourse with her, which

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had come to the knowledge of her father: that after the ceremony he never lived with her, or had any connection with her: that a child was born about four months after the marriage.

That at some time not specified, after the marriage, he discovered that she had been guilty of illicit intercourse with other men before he became acquainted with her, and that she was a common prostitute.

That after the marriage ceremony he resided for a year in Newark, and then removed to the state of Indiana; and after having resided there for one year, he commenced proceedings in a county court of Common Pleas for a divorce, and in March, 1867, obtained a decree of divorce from the defendant, which decree he admits to be void and of no effect within this state, for the reason that the defendant was not within the jurisdiction of the court, was never served with process, and never appeared in the suit.

That upon his return to Newark in 1867, proceedings were instituted against him by the city authorities, under the supplement to the vagrant act, approved March 4th, 1864, for the purpose of compelling him to support his wife and child: that the justices, on said application, and the Quarter Sessions, on an appeal by him from the justices, held the decree of divorce void, and adjudged him to pay a weekly stipend: that this judgment was removed by him, by certiorari, to the Supreme Court, where the matter is still pending.

That after these proceedings were commenced, and sometime between the 1st of January and the 1st of October, 1868, the defendant committed adultery with one James M. Clark, and for this he prays he may be divorced.

The defendant, in her answer, admits the marriage at the time stated, admits the ante-nuptial illicit intercourse with the complainant, and the birth of a child soon after the marriage, which she answers was the result of that intercourse. She admits that since the marriage, as is charged by the bill, she had lived with and been supported by her father.

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She denies that the complainant was compelled to marry her, but alleges that it was his own proposition upon discovering her situation. She denies that he did not, after the marriage ceremony, live with her, or have any connection with her, but alleges that for some months afterward he lived and cohabited with her at her father's house, and was there received and treated as her husband and a member of the family. She denies all ante-nuptial intercourse with any one besides the complainant, and that she has, since her marriage, ever committed adultery with James M. Clark, or any one else, and avers that she has always lived a pure and chaste life, except her ante-nuptial intercourse with the complainant. She admits the proceedings under the vagrant act, and the ruling of the courts as to the Indiana divorce. She also admits the youth of the complainant, and her own age, as stated in the bill.

The case of the complainant, as stated by him, does not present itself as one entitled to much favor in a court of equity. He debauched a girl of eighteen, was not willing to make the amende of marriage until threatened by her father either with legal proceedings or other steps; then he pledged himself to the injured one, by the most solemn rite of law and religion, to be her husband, and to support, cherish, and protect her, with the deliberate intention of doing neither; he immediately abandoned her, neither supported nor cohabited with her, and let her bear his child without his presence or recognition. After a year he went privily to Indiana, placed on the judicial records there a charge of adultery, which he does not here allege or attempt to prove was true, and in a proceeding of which she had no knowledge, and in which she could make no defence, branded her as an adulteress on the judicial record of that state; that it was upon "due proof" as alleged, only means that the proof was such as did, or ought to, satisfy the court; that the evidence was true is not alleged, nor will it be presumed, because, if true, it would have procured for him a divorce in this state that would have been valid everywhere, and that

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without the necessity of a year's sojourn in Indiana. After his return, and two successive decisions against his attempt to evade his duties as a husband and a father, this woman, whom, with her child, he had abandoned for four years, and left to apply to the overseers of the poor for relief, was guilty of adultery. He knew and had tested the strength of her passion and the weakness of power to resist: he knew of her destitution and poverty. Had he performed his duty as a husband, she would have been protected from the perils to which she was thus exposed. After having withstood these trials for nearly four years, she fell. And the complainant now applies for a divorce, not because this adulterer has destroyed his domestic peace, or robbed him of the *consortium* and society of a wife whose bed he never had shared, whose home he never had entered, but to get clear of the claims of the public upon him for the support of his wife and child, for which the Indiana divorce was not equal. He had for more than four years deserted his wife, and by the law of the state had forfeited his marital right over her at her option, for she was at any time entitled to a decree for a dissolution of the marriage, with proper alimony. This is the complainant's case upon his own showing. I throw out the charges of ante-nuptial unchastity and being a common prostitute, as scandalous and mere abuse, being without names or circumstances, and alleged in such manner that they might be struck out of the pleadings.

The proof, in one respect, shows a much better case for the complainant than is set out in the bill. It appears by the weight of evidence, that he lived with his wife for some months after his marriage, at least until after the birth of the child: that he stayed with her several nights each week, occupying the same room and bed: that he was present and gave proper assistance at the birth of his child: went for the physician and paid him. How long this continued, is not shown with any degree of clearness by the testimony: I think I will be safe in assuming it to have been for six or eight months after the marriage. It does not appear, even

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by allegations in the bill, why he then left her. The complainant has not been sworn, and no witness alludes to the matter. If it appeared that he was induced to leave her from credible information of her ante-nuptial incontinence, it might be, in some degree, an excuse in morals, though none in law.

Such incontinence is attempted to be proved by William F. Rankin, the person with whom it is charged to have been committed. He swears to it clearly and positively, and that it was repeated several times. But his evidence is unsupported by any other proof. It is the evidence of an accomplice in the alleged crime, always suspicious. In criminal proceedings such evidence is admitted, but cautious judges do not allow a conviction on the unsupported evidence of an accomplice. In this case, this charge is made improbable by the evidence of the sister and father of the defendant. And the evidence of Rankin is positively contradicted by the defendant herself. She is, to be sure, a party to the suit, and this must be allowed to weigh against her credibility.

The mere charge of adultery, even if proved, does not, in law, affect her credibility. If she had been shown as charged, to be a common prostitute, that might and would have great influence upon the reliance which would, in fact, be placed upon her testimony. But there is no proof whatever that she has ever prostituted herself even to James M. Clark, who once let her have \$4, and once paid a bill of \$2 to a doctor. It does not appear for what the \$4 was paid, and if the facts attempted to be connected with the doctor's bill are true, that was in no sense wages to her. There is no pretence of proof that she was a *common* prostitute. As she stands, I cannot give any preference to the testimony of Rankin, who, in addition to being an accomplice in the crime, must bear the load of the moral perfidy which always attaches to the breach of the promise not to betray, implied, when a girl of seventeen, in the house of her father, yields to an apparent suitor. Besides this, Rankin, in answer to the question

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first put to him on this subject, answered positively that he had never had such connection: and this answer, though contradicted, is not explained. And the spirit of Mephistophelian mockery at religion, manifested at the beginning of his testimony, by stating, at the time of his first acquaintance with the defendant, "the year when *Brother Hammond*, the revival preacher, was here:" unchecked by any shame for the exposure of himself, or remorse for the betrayal of her, on the disclosure he was about to make, does not, in my view, add to his credibility. I must regard the evidence as balanced on this point, and that the complainant, who has the burden of proof, has failed to show any ante-nuptial unchastity, except with himself. If fully proved, it would be no foundation for a divorce: it would not be admissible to support the proof of subsequent adultery, or even to make the evidence more credible, any more than upon the trial of an indictment, proof of a former crime would be admitted to support the offence then charged. But if it had been proved, and it had also been shown that it was the cause of the desertion, it would have tended to palliate the conduct of the complainant in that respect.

The allegation that the marriage took place under compulsion, and the threats of the defendant's father, is not only not proved, but is shown to be utterly unfounded and false.

The next question is as to the fact of adultery, by the defendant, with James M. Clark, charged in the bill as the foundation of the relief sought. The complainant, at or somewhere about the time when he abandoned his wife, had attempted to procure other men to commit adultery with her, to lay the foundation for a divorce. This is shown by three separate witnesses on part of the defendant—witnesses whose characters are unimpeached, and who are not contradicted in the substance of their testimony, or circumstances detailed, not even by the complainant himself, who necessarily knew the truth or falsity of this evidence. On each of these occasions he offered liberal rewards, in case of success. On one occasion he took his wife to New York, met the proposed

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adulterer, as if by accident, in the train, and left her with him on the corner of Broadway, under a feigned pretence. The hired adulterer did not succeed, so far as appears, further than to induce the defendant to enter a restaurant with him, and partake of refreshments. At another of these attempts, he concocted with his agent a scheme to drive his wife in a sleigh to Elizabeth, and then go by rail to Philadelphia, where the matter was to be accomplished. He advanced money for the trip, and went with the agent to get the sleigh. This scheme was again unsuccessful, but whether these failed from the virtue of the defendant, or the want of skill or the repugnance of the agent, does not appear.

The time of these several attempts is not shown, but I think it can be gathered, from the whole of the evidence together, that it was somewhere in the winter of 1865. These failing, the complainant, some time in 1865, removed to Indiana, and in January, 1867, commenced proceedings for a divorce in Indiana, which he obtained in March, 1867. In that year, after his return to Newark, the proceedings of the municipal authorities, above mentioned, to compel him to support his wife and child, which are still in progress, were begun. Complainant and his father, under the name of Hedden and Son, were manufacturers of photographic plates, which they had for some time furnished to James M. Clark, who was a photographer, and had his rooms at 299 Broad street, Newark. Clark was a single man, twenty-seven years old. In 1868 he had, as a partner in that business, Joseph A. Logan. The complainant was an intimate friend of Clark, but not, as Clark testifies, the most intimate friend that he had; he called at the rooms of Clark sometimes on business, frequently on other occasions, and was there several times a week.

Some time in March, 1868, the defendant went to these rooms in company with a female friend. She was not known either to Clark or Logan, nor does it appear, except by the defendant's testimony, for what purpose she went; she says, to have her picture taken; Clark or Logan do not recollect.

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She went afterwards to the gallery, the next time with the same friend, on like business. She introduced herself to Clark as George W. Hedden's wife. Clark, who did not know that Hedden had a wife, inquired of Logan, who informed him that he had. She continued going there at intervals, from March until and in September, 1868. She was there more than a dozen times in all. She went on with her mother, once with her sister, and once with her child; the child's photograph was taken, but not paid for. Clark kept a copy and presented it to the complainant because, as he says, he was the father of the child. Defendant went to these rooms also alone. She sometimes stayed there with Clark after business hours, and alone with Clark but never after seven o'clock. Clark's bed-room, after April 1868, was on the same floor with the gallery, in the rear, and the door opened in the gallery. The defendant came there one morning at eight or half past eight o'clock, anxious for some purpose, to see Clark, and told the office boy, who said that he was in bed, that she wished Clark would hurry up. She afterwards went into his bed-room, sat on the side of his bed, and asked him for \$4, which he gave her. She was there fifteen or twenty minutes, and the door was closed. She met Clark twice, by appointment, in these rooms, after business hours and alone. Clark would kiss her, sit with her on his lap, or with his arms around her, or holding her hand in his, in presence of the attendants in the office, and he raised her dress there to show her foot. On one occasion he directly asked for a favor in presence of Logan, to which she replied that he had already had too many; that she was in trouble by him. She told Logan that she was in trouble by Clark, and that she had been to Dr. Smith, who had relieved her. On another occasion, after business hours, when she was standing or walking with Clark there, and Logan and three others were standing at a table throwing dice, Clark proposed to them, in coarse language, to throw for which of them should enjoy Mrs. Hedden. She replied, "You won't," but manifested no further indignation or resentment.

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ment. Clark testifies that he did, when alone with her there, take off articles of her clothing, besides her hat and shawl; but what article he is unable to say, except that it was not her dress; perhaps he had forgotten. On one such occasion she was on his bed, and he also was upon it. He says that she made him believe that she was pregnant by him, and that he, at her request, paid Dr. Smith, whom she had consulted in the matter. But Clark does not testify directly that he had intercourse with her. When asked, he declined to answer that question, although he willingly answers a series of questions evidently aimed at proving the adultery, by proving facts and circumstances from which it may be inferred, and as to which his admissions are just as potent to convict him of the adultery as to condemn her. His refusal to answer the direct question, under such circumstances, cannot be taken to be for the purpose of saving himself, or protecting the defendant; it is a mere pretence, a toying with truth, an attempt to place himself in a position to which he is not entitled. Neither he nor any other witness has directly proved the adultery. The facts and circumstances proved are sufficient, abundantly sufficient in a cause differently situated, to convince any one of her adultery with Clark. In this case, the suspicion naturally arises that Hedden, who had repeatedly endeavored to induce others actually to commit the adultery, might have procured Clark to permit and tempt the defendant to be there under circumstances that would condemn her. This might account for some of these circumstances, but will not account for all. Her reply to him, in Logan's presence, that she was in trouble through him, and her statement to Logan that she had been in trouble by Clark, and that Dr. Smith had relieved her from it, will admit of no construction consistent with her innocence. The whole evidence forces upon me the conclusion beyond any reasonable doubt that the defendant was, some time between April and October, 1868, guilty of adultery with Clark at his rooms at 299 Broad street, in Newark. This is the offence charged in the bill with suffi-

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cient precision to entitle the complainant to the benefit of this proof. It is worthy of remark that, although these acts of adultery were within a few months before the filing of the bill, and the witnesses were examined within a year afterwards, yet no time is specified as to any of the interviews in which adultery might be inferred. Clark says that his bed-room was at the gallery after April, and Van Houten, who was present at her going to his bed-room in the morning, and at the dice scene, went there in July, 1868; these are the only guides.

Two other questions arise from the facts in this cause, both of grave importance and not free from difficulty. The first is, whether the complainant is not guilty of conniving at, and consenting to, the adultery of his wife in such way as to forfeit his title to a divorce; secondly: as he had, for more than three years before both the filing of the bill and the commission of the adultery proved, willfully and obstinately deserted the defendant in such manner that the obligation of the marriage contract was, by the law of the state, absolved as to her, and she entitled to a decree of divorce, whether he has any right to complain of adultery on her part, or to relief for the breach of contract which he had never performed on his part, and which was thus, by law, forfeited previous to her default.

The statute provides that if the adultery is by collusion, with intent to procure a divorce, or if the complainant is *consenting* thereto, no divorce shall be granted. This is an adoption and a re-enacting of the rules on this subject, adopted and applied by the ecclesiastical courts in England, in matters of divorce *a mensa et thoro*, of which they had jurisdiction, and the practice and decisions of these courts have, so far as applicable, been adopted and followed in this state in divorce causes. By these decisions, it is settled that a husband who connives at, or assents to, adultery by his wife with one person, shall be deemed as assenting to it with others, and will not be entitled to a divorce for a subsequent act of adultery with a different person. This doc-

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trine is both reasonable and well established. The only authority to the contrary is the judgment of Sir William Wynne, in the case of *Hodges v. Hodges*, 3 Hagg. 118. But that is a peculiar case, and the judgment is based upon the fact that the defendant was living with the subsequent adulterer and having children, which were baptised in the complainant's name, and who, she claimed, would be his heirs, as born within the bond of matrimony. And the judgment does not reject the rule, but avoids its application. The doctrine was sanctioned and approved by Sir William Scott (afterwards Lord Stowell) when Dean of the Arches, in *Timmings v. Timmings*, 3 Hagg. 76, and *Lovering v. Lovering*, *Ibid.* 85. And in the trial of the civil suit of *Hodges v. Windham*, which arose out of *Hodges v. Hodges*, Lord Kenyon charged, "that the husband, having suffered such connection with other men, was equally a bar to the action, as if he had permitted the present defendant to be connected with her." *Peake* 316. Dr. Lushington, in *Stone v. Stone*, 1 Robertson 99, alludes to the case of *Hodges v. Hodges*, and repudiates the doctrine "that the husband may connive at the adultery of his wife with one man, and at a subsequent period obtain a divorce in these courts for her adultery with another." These authorities say it is true that connivance in a prior case will not affect the complainant unless the adultery was committed. But this only applies to cases of mere connivance; these are when the husband, without positive acts, permits or suffers, without interference, conduct or acts which ought to convince him of the guilt of his wife. It has never been applied to a case where the husband actually attempted to procure the adultery to be committed. It ought not to be applied to such case. In the other class of cases, the result showed that the husband's confidence in his wife was, at the time, well founded, and his negligence not criminal. This reasoning cannot apply to a husband who has four times attempted, by large rewards, to induce others to commit adultery with his wife. He has entirely abandoned all right to claim that his

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Exhiben.

— thus consented to her adultery
— he tried to persuade to it, and

the rule, and if this court was
imputed to Sir William Wynne in
consent or connivance with adul-
tery, it did not take away the right of divorce
to marry with another; yet there is in this
evidence that the complainant knew of and
sanctioned acts of adultery with Clark, even if he
did not know to be committed.

— frequent visitor at this gallery, several times,
— intimate friend of Clark; after one of the
visits Clark gave him a photograph of his child. He
did not know to time what occurred there relative to his
wife, although Clark says he did not tell him the
truth. — states that he could learn it from the others,
— When the defendant first met Clark she told
him of her troubles with her husband. It is impossible
to suppose that Clark kept this story from his friend and
neighbor, who, as he must have known, hated his wife, and
was glad to see her degraded. It is possible to suppose
that his husband may have continued his visit to that
place without meeting his wife, but it is impossible to
suppose that he continued to visit there without hearing of
her visits, and the scenes that occurred. Clark testifies that
the complainant was in the habit of visiting him at his
gallery for various purposes; that he was at one time apt to
call in for a few minutes every time he came down town,
sometimes on business, and at others without business, other
than sociability. He testifies that he did not tell the com-
plainant what he testified to in the cause, but that com-
plainant had mentioned it to him, though not all the facts
he has sworn to; but he states that the facts were known to
Van Houten, to Moffat, and Logan; some of these had seen
the familiarities; he had told to Logan what he had not seen. I
do not think any one can doubt from the evidence, but all

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these men knew every thing done by or with Mrs. Hedden, as it occurred. Logan was told all. And the character of these men, of Clark, and of the place that he kept, leads irresistibly to the conclusion that what was known to Logan was known to all. Some of the witnesses show that she tried to keep out of Clark's way, when he attempted to touch her or use familiarities with her; that she would say "oh don't;" the natural inference was that this was at his first attempts, for no one would suppose that after the dice scene, or the solicitation scene, that she could feel or would affect, in presence of these men, any coyness. The whole history from her entering these rooms until her degradation to the depth she was made to submit to, was known to all. From the demoralized character of the complainant as shown in the case, from his feelings towards the defendant, his anxiety to procure her to be debauched, and from the character of the men whom he met at this gallery as his friends, Clark, Logan, and Moffat, I cannot believe that he was visiting there almost daily while this intrigue with his wife was going on, without knowing it, and that in its details. It is possible to believe Clark when he says that he did not tell them to the complainant, because it is possible and not difficult to believe that Clark set about accomplishing, as a friend of complainant, what he had failed to procure to be done for money, and was aware that it was best that complainant should not know it from him. The positive evidence which is in the case, that he knew these transactions, *may* be so construed as to mean knowledge after the completion of the matter, and there are no words to fasten this knowledge to that time; but the inference unavoidably to be drawn from the facts is, that it must have been communicated as the matter progressed. The proof is circumstantial, but so is the proof of the defendant's adultery, and I have as little doubt of the complainant's knowledge of this matter at the time, as I have of the defendant's adultery. The solicitation scene in Logan's presence, and the dice scene in presence of the four, Logan, the two Moffats, and Van Houten, while

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they show, what they were proven to show, the degradation of the defendant and her utter subjection to Clark, seem to indicate a purpose on part of Clark to have proof by others than himself, to give effect to his evidence of circumstances, if he should find it best to decline answering directly as to the act of adultery. I cannot conceive how, without some such object, unless sunk much lower in profligacy and brutality than I have any right to infer of Clark, he could thus gratuitously degrade any woman that he was willing to enjoy, by offering her person to four of his comrades on the throw of dice, or even by soliciting for himself in the presence of any one. But I do not put the case on the ground that the complainant employed Clark to commit the adultery: the proof, although it may excite suspicion, is not sufficient for that purpose. But it is sufficient to show that he knew of the visits of his wife to this establishment, and of the character and intentions of Clark. If he knew this, his standing by without interfering, and permitting it to go on, is sufficient acquiescence and connivance to deprive him of his right to divorce. It is, in law, consent.

It is laid down that if a husband sees what a reasonable man could not see without alarm, or if he knows that his wife has been guilty of ante-nuptial incontinence, or if he has himself seduced her before marriage, whereby he is put upon his guard respecting her weakness, he is called upon to exercise a peculiar vigilance and care over her, and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and accept the result. *Bishop on Marr. and Div.*, § 344: *Poynton on Marr. and Div.* 227-230: *Dillon v. Dillon*, 3 *Curtis* 86: *Morse v. Morse*, 3 *Hagg.* 87.

In this case the complainant, if guilty of connivance at all, must be held guilty with intent that his wife should be led to commit adultery. It is not a case that can excuse his inaction by overweening confidence, or want of discernment, or his unsuspecting nature. Nor was he discharged from the vigilance required, by his having deserted her, and

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all his marital duties for three years, or by his having obtained a divorce in another state. If the marriage relation existed in this state so that he can complain of a violation of its obligations, he was not discharged from the obligations imposed by it, to watch over and protect the virtue of his wife and not to permit her to be debauched, when caution on his part would prevent it. The maxim *volenti non fit injuria*, applies with peculiar force to such a case.

The contents of the record of divorce exhibit the complainant in such a light as to strengthen and justify the conclusions arrived at as to his intentional connivance, so far as founded upon his disregard to truth and principle. The petition states as the ground of divorce, that at the marriage he believed the defendant to be virtuous, and that she had never had carnal connections with *any person*, but that on the same evening he discovered that she was pregnant, and for that reason he has never lived with her, or had sexual intercourse with her. This is the only reason for divorce contained in the petition. The decree adjudges that upon the proof, "the matters and things set forth in the petition, are true as therein alleged." The fact that he had antenuptial intercourse with his wife is admitted in the bill in this case, and must be taken as true for all purposes, and the fact of cohabiting with his wife for months after marriage, is proved beyond question. This shows that the divorce was procured on pretences known by him to be false, and proved by perjury or subornation of perjury, on his part. The bill in this case deliberately misrepresents that decree as founded upon adultery. And some such misrepresentation was necessary to make the allegations in the bill consistent with themselves.

I am therefore of opinion that the statutory bar of consent to the adultery, is proved in two ways. First, by the consent to adultery with three other persons whom he employed to commit the crime with her, which in the case of such actual employment, I hold to be a sufficient consent to subsequent adultery with others, although the adultery he

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devised was not committed. Secondly, by the proof from circumstances, of his knowledge of and connivance at her intercourse with Clark, in such manner as to show intentional consent on his part to that adultery.

This debars the complainant of the relief sought, and renders it unnecessary to consider the question, whether the desertion for three years, under circumstances which entitled the defendant to a divorce before the commencement of this suit, and before any adultery proved, would bar the complainant. The courts of some states, with statutes like our own, have held this a sufficient bar. The reasoning of those cases would apply with increased force to this case, where the complainant has, by a divorce, beyond question valid in the state of Indiana, so far actually severed the marriage tie, that when there, he is free from all duties to his wife, could contract another valid marriage, and could live with such other wife without adultery, and, if the law of that state is like that of New Jersey, would be guilty of adultery by even living in the same house with the defendant.

McCLANE'S ADMINISTRATRIX vs. SHEPHERD'S EXECUTRIX.

1. A plea of release is not void because it is not stated in the plea, or the answer in support of it, that the release was obtained freely and without fraud, when the bill contains no allegation of fraud.

2. Such issue cannot now be raised by special replication. The modern practice is to permit the complainant to amend his bill by inserting allegations which will raise the issue, and require the defendant to answer as to them.

3. The statute of limitations is a good plea to a bill for an account of trust funds, where the trust is not direct or express, but arises merely by implication.

The question in this cause was the sufficiency of the pleas.

Mr. W. H. Vredenburg, for defendant.

Mr. J. Parker, for complainant.

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THE CHANCELLOR.

Douglas McClane, the intestate, and husband of the complainant, in 1856, disappeared from his house under circumstances that convinced his friends that he was dead. The complainant and Joseph Shepherd, the defendant's testator, were appointed the administrators of his estate; they sold his personal property, and also part of his real estate under an order of the Orphans Court of Monmouth county to sell his lands for the payment of his debts. In 1857, Douglas McClane was discovered to be alive, and upon finding out the situation of affairs, he executed to Joseph Shepherd a power of attorney, dated March 16th, 1857, by which he authorized Shepherd to execute in his name deeds of conveyance of all his lands; approved and confirmed all the sales he had made, and all payments made to him, and authorized him to receive what might be due on sales; and also authorized him to pay any debts owed by McClane, and all expenses attending the sale of his property, and to retain to himself full payment of all commissions, fees, and expenses attending such sales, and also ratified all payments made by said administrators out of the moneys received.

McClane afterwards executed a release to Shepherd, dated October 13th, 1858, purporting to be made on a settlement of all accounts between them, and in consideration of \$10,989, and thereby released and discharged him from all demands, both at law and in equity.

After this alleged settlement, both McClane and Shepherd died; Shepherd in 1862, McClane in 1866. And the bill is filed by McClane's administratrix against the executrix and heirs-at-law of Shepherd, for an account of the moneys received by him for the sale of the property of McClane, under the administration granted to him, and under the power of attorney.

To this bill the defendant pleads first the release, setting forth that all the moneys charged in the bill to have been received, had been paid to and settled with McClane in his lifetime, and that the release was executed in consideration

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of \$10,989, before that time paid to him at his request, and was executed under seal.

(And the answer in support of the plea alleges that all moneys received by Shepherd, as charged in the bill, were paid to him, or as directed by him, before the date of said release.

(It is urged that the plea of release is void, because it is not stated in the plea or the answer in support of it, that the release was obtained fairly and without fraud. The authorities cited in support of this position are *Daniell's Ch. Pr.* 694; *Story's Eq. Pl.*, § 796, 312; *Roche v. Morgell*, 2 *Sch. & Lef.* 720; *Phelps v. Sproule*, 1 *Mylne & Keene* 231.

(The language of Lord Redesdale, in his opinion in the House of Lords in *Roche v. Morgell*, may seem to warrant the conclusion; but upon examining that case and the other cases cited in the above authorities, it will be found that in all, there were, in the bill, allegations of fraud or other matters which would, if true, have avoided the release, and that the cases only hold that it is necessary to deny, in the plea and in the answer in support of the plea, those allegations in the bill which, if true, would avoid the release. There are in this bill no allegations of fraud or of any other fact which, if true, would avoid this release. And the plea states the consideration of the release, and that it was under seal. The plea of release must be sustained as a good plea.

(But the complainant asks leave to amend her bill, that she may allege that the release was fraudulent, and thus compel the defendant in her plea to deny the fraud, and in her answer in support of the plea to discover the facts as to the alleged fraud. The special replication formerly allowed, by which this issue might have been raised, has been long disused, and is no longer permitted; the practice is now to permit the complainant to amend the bill by inserting allegations which will raise the issue, and require the defendant to answer as to them. The application for leave to amend was made before the argument upon the plea, and it was agreed that it should not be waived by the argument. The

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complainant must be allowed to amend, upon payment of costs.)

It is contended that the plea of the statute of limitations is not good, because it relates to a trust; that Shepherd, in this case, was a trustee for McClane.

The statute of limitations is a good defence in equity as well as at law. When it does not, by its terms, apply to courts of equity, they have adopted it by analogy to the defence at law, in all cases in which it would be a defence in courts of law. But it is no defence in matters of a purely equitable nature, and of which courts of equity have an exclusive jurisdiction. Trusts are held to be within this exception, being matters of pure equity jurisdiction. But this exception is confined to express and technical trusts, and not to such as arise by implication.

In *Angell on Limitations*, § 166, it is laid down "that to exempt a trust from the bar of the statute it must be a direct trust, and must be of the kind belonging exclusively to the jurisdiction of a court of equity." In the case of *Allen's Adm'r v. Woolley's Ex'rs*, 1 *Green's Ch.* 209, Mrs. Allen had put all her property in the hands of Woolley, by a writing, directing that he should place the same at interest, and apply the interest and part of the principal, if necessary, to her support. The Chancellor says that "no time will bar the claim in case of a direct trust." But whether that trust was of such a character created the doubt. He held that it was "an express direct trust, to which no plea of the statute of limitations was applicable." "This is unlike a delegated power confided to a person for a single or limited object; it reached her entire property, related to her whole living, and by its very terms, was a continuing fiduciary engagement." The facts in that case which the Chancellor relied on as constituting a direct or express trust, do not exist in this. And he adopts the distinction taken in the cases he refers to, that the statute does not apply where the trust is not express or direct, but arises by implication merely. In that case the

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cestui que trust most clearly could not have maintained a suit at law.

In *Goodrich v. Pendleton*, 3 Johns. C. R. 384, the money is stated to have been received from the government by the defendant, as agent and *trustee* for the complainant, which created a direct trust. Chancellor Kent, in a learned and well considered opinion in *Kane v. Bloodgood*, 7 Johns. C. R. 113, clearly recognises this distinction, and says in commenting on the judgment of Lord Macclesfield, in *Lockey v. Lockey*, *Prec. in Chancery* 518: "The doctrine of this case is that the trusts which are not within the statutes, are those which are creatures of the court of equity, and not within the cognizance of a court of law, and that as to those other trusts which are the ground of an action at law, the statute is, and in reason ought to be, as much a bar in one court as in the other;" and he approves and acts upon that doctrine. In *Farnam v. Brooks*, 9 Pick. 242, Chief Justice Parker, in delivering the opinion of the court, says: "This exception is confined to direct trusts created by deed or will, or perhaps by appointment of law, such as executorships or administrations. But cases of constructive trusts, resulting from partnerships and agencies and the like, are held to be within the statute." In *Robinson v. Hook*, 4 Mason 152, Justice Story says: "But as to cases of merely constructive trusts created by courts of equity, or cases which are treated for some purposes as implied trusts, to which however legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them."

In this case there is no express or direct trust. None was created by the administrator's deeds; they were simply and absolutely void, and the money received on them did not belong to McClane, but to the purchasers. When McClane authorized Shepherd to execute deeds confirming those sales, and directed the money before paid, should be credited on the new conveyances, and authorized Shepherd, as his attorney, to sell all the residue of his property, and to pay with money received, his debts, Shepherd was not thereby made

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his trustee, but his agent. The money he had already received, and which, until the conveyances were confirmed, the purchasers could claim by their accepting the conveyances made by Shepherd as attorney, was freed from the claim of the purchasers, and was held by him as money had and received for the use of McClane. And if any money remained he held it as McClane's agent, and was bound to pay it to him. There can be no doubt but an action for money had and received, would lie at law for it. The law would raise a promise to pay it over under the circumstances of this case. If any trust whatever exists in this case, it is not a direct or express trust, but one arising by implication. The statute of limitations is a good plea.

LINELL'S ADMINISTRATOR vs. LINELL and others.

1. A direction by a testator, that the proceeds of certain lands be applied to erect a house, if his family desired it, with no other directions as to those lands, leaves them undisposed of; as to them, testator is intestate.
2. A declaration after devising lands to his son H., that "I do not, therefore, give him any further portion," does not bar H. from inheriting part of the lands as to which testator died intestate.

This cause was argued upon bill and answers. The bill was filed for a construction of the will of the testator, annexed to the letters of administration issued to the complainant. The funds in his hands are the proceeds of the sale of lands in Newark, of which the defendant, James S. Linell, claims one-fourth; the three other defendants contend that he is not entitled to any interest therein. The controversy is between these defendants.

Mr. T. Runyon, for James S. Linell.

Mr. A. S. Hubbell, for the other defendants.

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THE CHANCELLOR.

The testator, by the ninth clause of his will, directs that the proceeds of his real estate in New Jersey, and any property he had not before disposed of, should be used to pay his debts and to erect a house, which he had authorized to be built for a homestead, on a lot which he had purchased in Michigan, if his wife and family should desire it; and that any balance remaining should be placed at interest for the use of his wife and family.

He directed that a tract of land which he owned in Michigan, adjoining the homestead lot, should be kept for five years, for the use of his wife and children; and after that, should go to his four oldest children, subject to an annuity to his wife during widowhood. He gave a house and lot in Canandaigua to his son Henry, when of age, and until then he gave the rents for the use of the family. He gave to each of his daughters \$1000 as she became of age, and until then, gave them a home with his family and support out of his estate. He gave to his son James his note for \$600, in addition to \$1900 which he had before given him, and stated, "I do not, therefore, give him any further portion until the farm aforesaid is divided as above directed."

Besides the four defendants, the testator left, at his death, two infant children of tender years, who died under ten years of age. His family consisted of his widow, these two infant children, and the four defendants. Since his death, his widow and two daughters have married, and the family have broken up and separated. His widow released to the defendants all her interest in the estate.

The proceeds of the lands in Newark were not needed to pay debts, or to erect the homestead. The homestead was sold after the marriage of the widow and the breaking up of the family.

In this situation, the lands in Newark and their proceeds, are not disposed of by the will of the testator. The only dispositions which he attempted have failed, and as there is **no residuary** clause in the will, except that contained in the

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clause in which these lands were attempted to be disposed of, he must be held, as to these lands, to have died intestate.

But the other defendants claim that the provisions of the fifth clause, in stating "that I do not, therefore, give him any further portion until the farm is divided," shuts out James from receiving any more of the testator's estate, except his part of the farm.

I do not think that this provision can have that effect. The testator most probably supposed that he had disposed of all his property. And in that disposition he intended to give James, in addition to the \$1900 before given to him, his note of \$3000 and one-fourth of the farm; he did not intend to give him any more. He gave to each of his other children specific legacies, and did not give them any more; he evidently did not intend to give them any more; but he did **not** say this in words, as in James' case, but he said so by **his** act. He made no provision as to a surplus which he did **not** suppose would exist; he did not provide that James should have no more of his estate; only that he, by the **positive** provisions of his will, would not give him any more.

If he supposed there would be a surplus, the case seems to **me** still stronger. If he deliberately intended to die **intestate** as to part, he would have provided that his son James should be excluded, if he so intended. He could have not understood the words, "I do not, therefore, give him any further portion," of what he was then dividing, to have the effect of excluding him from any surplus. I am of opinion, therefore, that the testator died intestate as to these proceeds, and that James is not excluded from his share.

And this share will not, as contended, be affected by the advancement of \$1900 made to James in the testator's life. These lands, at his death, were real estate, and, so far as not disposed of, descended as such, and no advancement of lands was made to James. If they were not real estate, yet the statute directs advancements to be allowed only in distribution of the surplusage of the goods of any *person* dying intestate. This must be held only to apply to persons dying

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wholly intestate; the words and equity of the statute both require such construction. It would be gross injustice, and a perversion of the object of the statute, to apply it to a surplus not disposed of, in a case like this, where the testator, in the dispositions which he has made, has taken such advancement into consideration, and in that way fixed the share of each child.

James is entitled to one equal fourth of the surplus in the complainant's hands, and each of the other children to one-fourth of it.

FEIT'S EXECUTORS vs. VANATTA and others.

1. The word "children" will not be construed to include grandchildren, unless there is something in the context to show that the testator intended that it should include grandchildren, or unless the provision will be inoperative without such construction.

2. Upon an ordinary limitation *by way of remainder* to children, &c., in a class, all who are *in esse* at the time of the death of the testator, take vested and consequently transmissible interests, immediately upon the testator's death.

This case was argued on final hearing, upon pleadings and proofs.

Mr. Shipman, for complainants.

Mr. P. D. Vroom, for defendants.

THE CHANCELLOR.

The bill is filed by the complainants for the construction of the will of Mary Feit, and for directions as to the execution of it, which devolved upon them as the executors of Paul Feit, her surviving executor. Mary Feit bequeathed to each of her other children \$700, and then bequeathed to her executors \$700, in trust, to pay the interest annually to her daughter, Ann Davision, during her natural life, and

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after her decease, bequeathed the same to the children of her daughter, Ann Davison, share and share alike; but if no children of her daughter Ann should be living, then to fall into the residue of her estate.

The residue of her estate she directed to be equally divided among her children; and that the part which should fall to her daughter, Ann Davison, should remain in the hands of her executors, and the interest of it be paid to her daughter Ann, during her natural life; and after the decease of Ann, she gave her part of the residue to her children, equally to be divided among them. At the date of the will Ann had one child, Mary, who afterwards married Samuel Vanatta, by whom she had children. She died in the lifetime of her mother, leaving her husband and children surviving her. Ann Davison died in 1866, leaving no other children or descendants than the children of Mary Vanatta. Ann Davison's share of the residue was \$746, which was retained for her by the executors; and the question now is, whether this specific and residuary bequest passes to her daughter's children, or to her representative, or falls into the residue of the estate.

The word children used in this will, does not, in its settled and usual signification, include grandchildren, though it is sometimes used to include them. The settled rule in the construction of wills is, that it will not be construed to include grandchildren, unless there is something in the context to show that the testator intended that it should include grandchildren, or unless the provision will be inoperative without such construction. 1 *Roper on Leg.* 68; 4 *Kent* 345; 2 *Jarman on Wills* 69; 2 *Williams on Executors* 988; *Crooke v. Brookeing*, 2 *Vern.* 106; *Radcliffe v. Buckley*, 10 *Ves.* 195; *Moor v. Raisbeck*, 12 *Sim.* 123; *Mowatt v. Carow*, 7 *Paige* 328; *Cutter v. Doughty*, 23 *Wend.* 522; *Tier v. Pennell*, 1 *Edw. Ch.* 354; *Hone v. Van Schaick*, 3 *Edw. Ch.* 474; *S. C., in Error*, 3 *N. Y.* 538.

In this case, there is nothing in the will to show that the testator intended to include grandchildren. There is no

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provision in it which would be in any way inconsistent with an express direction that this \$700 should in no case be paid to Ann's grandchildren: and the bequest was clearly valid and operative to vest the legacy in Mary, the daughter of Ann, who was living at the date of the will. These words must then be taken in their usual and natural signification to mean children only, and not to include grandchildren. Then the provision that if no children of Ann should be living at her death, the specific legacy of \$700, should fall into the residue of her estate, took effect upon the death of Ann, without any child surviving.

This limitation over is confined to the specific legacy, and is not annexed to the bequest of the residue. The gift of the interest of the residue to Ann, for life, and the principal to her children at her death, gave a vested interest to such child of Ann as was living at the date of the will, and the death of the testatrix. This was held by the Court of Errors, in a will where the children were named, in *Howell's Ex'r v. Green's Adm'r*, 2 Vroom 570.

The result of the decisions on this point, is correctly stated in 2 *Williams on Executors* 983. "Upon an ordinary limitation *by way of remainder* to children, &c., in a class, all who are *in esse* at the time of the death of the testator, take vested and consequently transmissible interests, immediately upon the testator's death, and all who come *in esse* before the particular estates end, and the limitation takes effect in possession, are to be let in, and take a vested interest as soon as they come *in esse*, and they and their representatives will take, as if they had been *in esse* at the testator's death." In the residuary bequest there was no limitation over in case no child of Ann was living at her death, as in the gift of the \$700. The residuary legacy to Ann being vested in her daughter Mary, from the death of the testatrix, and no other child having been born in the life of Ann, must be paid to the representative of Mary; that is the administrator of her estate. It is personal estate, and after payment of debts must be distributed according to

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law. In this case it will belong to her husband, Samuel Vanatta.

It was a proper case for the executor to ask directions, and the costs of the parties must be paid out of the estate; also, a counsel fee to the executors.

FARNUM vs. BURNETT and others.

1. An instrument under seal is good, though no consideration was given for it. Courts will not allow the consideration to be inquired into for the sake of declaring the instrument void, for want of consideration, but they will, for the purpose of ascertaining what is due upon it.

2. A mortgage given by the legal owner of the fee of mortgaged premises to one of several persons having a beneficial interest therein, with the consent of all the others, for the avowed purpose of enabling him to raise money on it, is a perfectly valid security, and in the hands of any one who has advanced money or become security for money raised, is upon a sufficient consideration to sustain it, as against all subsequent encumbrancers or purchasers.

3. A mortgage made for future advances is good as against a subsequent purchaser or mortgagee.

The argument of this cause was had upon final hearing, upon the pleadings and proofs.

Mr. Lewis, for complainant.

Mr. Magie, for defendant, Stratton.

THE CHANCELLOR.

The defendant, Burnett, held the title to the premises conveyed by the mortgage in this case, in October, 1863, for his own benefit, and that of the defendants, Wood and Southwick. Each was interested in an equal third. At that time he executed a mortgage on the whole premises, to the defendant, Wood, for \$2500, with interest, payable in three years. No consideration was paid by Wood for this mort-

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gage, but it was given to him to enable him to raise money on it, and because he was interested in the property. This mortgage, Wood, on the 24th day of December, 1863, delivered to the defendant, Southwick, with a written assignment, leaving a blank for the name of the assignee, with power to insert any name he might desire. It was delivered to him for the purpose of raising money upon it. The verbal understanding at the time was, that the money should be raised for the benefit of both Wood and Southwick. Southwick having inserted in the assignment the name of the complainant as assignee, delivered it and the mortgage, and the bond given with it, to the complainant as security for endorsements which the complainant might make for the benefit of himself and Wood, or either of them. The complainant then endorsed two notes of \$1000 each, one drawn by Wood, the other by Southwick, each endorsed by the other, and each received the amount obtained by the discount of his note. Wood did not know how or of whom the money was procured, and paid the amount of his note at maturity to Southwick, and about or after that time agreed with Southwick, that Southwick should take the mortgage for his own benefit and convenience, and should account for the same, or have the mortgage canceled; and took from Southwick a written stipulation setting out that agreement, which for some reason was dated back to December 26th, 1863. The notes endorsed by the complainant were taken up by the proceeds of new notes or checks endorsed by him, and discounted for the purpose. And the endorsements for the accommodation of Southwick were continued until April 5th, and May 4th, 1866, when two checks each for \$1680, both drawn by Wood, to the order of Southwick, and endorsed by him and Farnum, were protested, and paid by Farnum. These checks were endorsed by Farnum, at the request of Southwick, for his benefit, and Farnum now seeks to foreclose this mortgage to repay the money paid on these checks; he claims to hold the mortgage to indemnify him from his endorsements on them.

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In 1866, Burnett mortgaged part of the same premises to the defendant, Stratton, to secure the payment of \$7000. He had before conveyed, with warranty, the residue of the premises. This, as between these purchasers and Stratton, throws the whole burden of the complainant's mortgage on the part so mortgaged to Stratton. Stratton foreclosed his mortgage without making the complainant a party, and at the foreclosure sale became the purchaser of the premises in his mortgage, which were conveyed to him by the sheriff's deed, August 29th, 1868.

Stratton contends that the complainant's mortgage is void for want of consideration, as between Burnett and Wood, and that if not void, that the debt or liability for which it was assigned, has in whole or in part been paid and discharged.

A bond and mortgage, or any instrument under seal, implies a consideration, none need be proved; and it is good if it is shown that none was given. And neither courts of law or equity will allow the consideration to be inquired into for the sake of declaring the instrument void for want of consideration; but they will, for the purpose of ascertaining what is due upon it. This mortgage given to Wood by Burnett, the legal owner of the fee, with the consent of the others interested, for the avowed purpose of raising money upon it, is a perfectly valid security, and in the hands of any one who has advanced money, or become security for money raised, is upon a sufficient consideration to sustain it, as against all subsequent encumbrancers or purchasers.

The object of the assignment is clearly proven, by both Farnum and Southwick, the parties to the transaction, and no witness in any way contradicts their testimony. It was to secure Farnum for endorsements made by him for Wood and Southwick, or either of them. The endorsement of the two checks of \$1680 each, and the payment of them by Farnum, is proved and not disputed. The amount paid by him exceeds the amount due on the mortgage, and he is entitled to all the principal and interest due on the mortgage, as indemnity in part for that payment.

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The payment of his first note by Wood to Southwick cannot affect Farnum ; the amount was not paid to him. And if it had been, and the first notes of Southwick and Wood had both been paid, yet under the agreement as proved upon which the assignment was delivered to Farnum, that it was to be held as security for any endorsements he might make, it is security for the endorsement of the two checks — And a mortgage made for future advances, is good as against a subsequent purchaser or mortgagee. —

SEEGER'S EXECUTORS vs. SEEGER and others.

1. Where the will contains no power or direction to sell, such power is not created by implication, because necessary or convenient to enable the executors to execute the directions of the will.

2. When express directions are given to sell, and no person is named to make the sale, the power of sale is held to be in the executors by implication, in cases where it is their duty to distribute or pay out the proceeds.

This cause was argued for final decree on pleadings and proofs.

Mr. Aitkin, for complainants.

THE CHANCELLOR.

This bill was filed by the complainants, the executors of the will of Adam Seeger, deceased, for a construction of the will and directions as to their duty. The will gives one-third of all testator's estate to his wife, Magdalena, and the remaining two-thirds to his two children, the infant defendants, Anna and Charles. It directs the executors to invest the two-thirds of his property, and use the interest and so much of the principal as is necessary for the education and maintenance of his two children. It directs that if one of his children should die, the other should be entitled to the

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full two-thirds, or so much as should remain; and if both should die, he gave the two-thirds, or so much as should remain, to the defendants, the German Evangelical Lutheran Trinity Church of Trenton. The will contains no directions to sell.

Testator's wife died a few weeks before him; they left two children only, the infant defendants. His whole estate consisted of a house and lot in Trenton, the rents of which are entirely insufficient to educate and support these children, who are now fourteen and nine years of age, respectively.

The complainants are advised that they have the power of sale by implication, as without it they cannot perform the directions of the will, and invest the principal and apply so much as may be necessary to the education and support of the children. They pray a construction of the will and directions as to their duty.

There is no authority or decision, so far as my researches have extended, which holds that in a will which contains no power or directions to sell, such power is created by implication, because necessary or convenient to enable the executors to execute the directions of the will. When express directions are given to sell, and no person named to make the sale, the power of sale is held to be in the executors by implication, in cases where it is their duty to distribute or pay out the proceeds. The cases referred to in the argument are confined to this point, and go no further. None of them sustain the position vaguely laid down in Washburn's Treatise on Real Property, and referred to in the argument. I am not inclined to extend the implication beyond the authorities.

The executors have no power to sell even the two-thirds devised to the two children. The other question raised, as to the extent of the estate of the children, are not proper to be decided in this suit, which relates merely to the power and duty of the executors, who have no interest in that question; it is a question of law between the infant defendants and the church.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY.

MAY TERM, 1870.

COURSEN *vs.* CANFIELD and VAN SYCKLE.

1. The failure of a mortgagee to keep his covenant to procure certain releases, is no defence to a suit for a foreclosure of the mortgage, where the mortgagor agreed to pay the money at a certain time absolutely, and not on condition that the releases had been procured.

2. It does not affect the question, that the suit is brought by a *bona fide* purchaser of the mortgage for a valuable and full consideration, without notice of this covenant. He holds it subject to every equity and defence to which it was subject in the hands of the mortgagee.

3. Courts of equity will not give to such independent covenants an effect different from their legal effect, or turn independent covenants into conditional, because it will give better protection to a party, or diminish litigation.

The cause was brought to final hearing, upon the pleadings and proofs.

Mr. Coult, for complainant.

The bill in this cause was filed to foreclose a mortgage given by John Canfield to Andrew W. Shaw, January 2d, 1866, to secure the payment of \$2518.34, of which \$1000 was due April 1st, 1866, \$1000 April 1st, 1867, and the balance April 1st, 1868, with interest, payable April 1st,

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1866, and annually thereafter. Canfield, the mortgagor, paid Shaw, the mortgagee, five days after its execution, on the mortgage, \$215.59, and he paid the interest in full to April 1st, 1867. The whole balance was due before the bill was filed.

On the 5th day of October, 1868, the mortgage was assigned by Andrew W. Shaw, the mortgagee, to Arminda Coursen, the complainant. The premises covered and conveyed by the mortgage, are situate in the townships of Green and Stillwater, in the county of Sussex, and were sold by Canfield, the mortgagor, to George L. Van Syckle, the other defendant, on the 21st of December, 1868, and he assumed to pay complainant's mortgage as part of the purchase money.

The defendants seek to avoid the payment of the money, and the foreclosure of the mortgage, on the following grounds: 1st. They allege that the mortgage was given by said Canfield to said Shaw, to secure a part of the purchase money for the premises therein described, which, on the day the same bears date, were conveyed by said Shaw and wife to said Canfield, by deed of warranty. 2d. That on the day the said deed was executed and delivered, and the mortgage given, Shaw, the grantor, executed and delivered to said Canfield an agreement in writing, and under seal, whereby he bound himself to procure and deliver to said Canfield certain releases, the better to secure the title to the premises he had conveyed, and that Shaw has broken his covenants in this agreement contained. 3d. The defendant, Canfield, alleges that at the same time the written agreement was executed, Shaw, the mortgagee, *verbally* agreed with him that no part of the principal of the mortgage should be payable, until he had performed his written agreement. 4th. They allege that at the time Canfield conveyed to Van Syckle, he represented to Van Syckle that no part of the principal of complainant's mortgage was to be paid, until the releases mentioned in the agreement between Canfield and Shaw had been procured by Shaw, and that Van Syckle assumed to pay

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complainant's mortgage on that express understanding. 5th. That they are advised by their counsel, that the title of Shaw, the grantor, and mortgagee to the premises conveyed by him to Canfield, and covered by complainant's mortgage, is a *determinable fee*, and set forth portions of the wills of Robert C. Shaw, the father of said Andrew, and of Andrew his uncle, from whom they claim said Andrew W. Shaw derived his title to the premises in question, to show that this opinion is correct. 6th. They allege that Shaw, the mortgagor, has removed from the state, and that he is not responsible.*

These comprise all the *material* allegations contained in the defendants' answer. Do they constitute a defence to this suit? It is submitted they do not.

1st. Because, if the pretended oral agreement was made, and that, with the written agreement, would constitute an equitable defence as against Shaw, the mortgagee and grantor, they would not against a *bona fide* assignee.

A written or oral agreement made at the same time the mortgage was given, or subsequently, changing, limiting, or defeating the mortgage, of which the assignee had no notice, *actual* or *constructive*, to which the mortgagor was a party, would not affect the right of the assignee. It is a *fraud* upon an innocent purchaser, against which equity will not give him relief.

2d. Because, these allegations together amount only to an allegation of an outstanding title, or a defective title, and of covenants broken; and where there has been no eviction or ejectment brought, no such defence can be set up against a foreclosure suit, even by the *mortgagor*. *Long's Adm'r v. Long*, 1 *McCarter* 462.

3d. The complainant having taken the mortgage *bona fide*, before the sale of the premises by Canfield to Van Syckle, if the title is defective, or even if it had failed, this defence cannot be made. The remedy of Van Syckle would be against his grantor, on his covenants. *Smallwood v. Lewin*, 2 *Beas.* 123.

4th. The written agreement executed by Shaw, was given to secure Canfield against some possible contingency, or supposed infirmity in Shaw's title. It is a distinct and independent covenant, in no wise connected with the deed of conveyance, and, as to it, the personal responsibility of Shaw. The damage which *Canfield* may suffer from a breach of this agreement *if any*, are unliquidated and uncertain, and cannot be ascertained *now*, or in *this suit*. *Long's Adm'r v. Long, supra*.

5th. The alleged *oral* agreement set up in the answer, is *not* proved, but on the contrary, is disproved; no such agreement was ever made.

6th. There is no proof that Shaw, the covenantor, is not responsible, and able to respond to any judgment for damages, which may be recovered against him.

If, however, the question of *title* can be considered, if it be considered that such a defence can be set up, then we contend that the title in Shaw at the time the mortgage was given, was a fee simple, *indefeasible*.

1st. Although by the will of Robert C. Shaw, from whom title to part of the premises conveyed by Shaw to Canfield and covered by the complainant's mortgage, was derived, the *fee* given to the sons was limited by executory devise to the survivors; by the codicil executed nearly *seven* years later, this limitation or condition was removed, and the lands which came to Andrew Shaw and his brothers, from the father, which form a part of the premises conveyed by said Andrew to Canfield, were devised to them in severalty and in *fee simple, absolute*. The intention of the testator in this respect is clear, and this will govern in the construction. *Redf. on Wills* 359, § 27; *Smith v. McChesney*, 2 *McCarter* 359.

2. By the will of Andrew Shaw, deceased, the premises devised to John, Job, George, and Andrew, part of which are covered by this mortgage, were devised subject to a like condition. The entire interest of the brothers, John, Job, and George, in the premises in question, which they had, or

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might have had, under the will of Andrew Shaw, deceased, and also under the will of their father, was conveyed to said Andrew W. Shaw before the conveyance made by him to said Canfield, and thus the title to the whole has become *absolute* and perfect.

No damage, therefore, can arise to Canfield, or his grantee, from a breach of Shaw's warranty, or of the covenants in his written agreement with Canfield.

Mr. Ludlow McCarter, with whom was *Mr. Hamilton*, for defendants.

The bill is filed on bond and mortgage given by Canfield to Andrew W. Shaw, assignor of the complainant, for part of the purchase money of lands conveyed by Shaw to Canfield.

The defence is that the title of Shaw being defeasible, subject to his dying without issue, with remainder over, in that case, to his surviving brother and sisters, (Shaw, at that time, and still, having had no issue,) that it was agreed, therefore, that Canfield should pay part of the purchase money, giving a mortgage for the remainder, and Shaw executed a deed poll, covenanting to perfect the title by procuring deeds of release from those holding these executory interests; that these covenants of Shaw have not been performed; that the defendant is ready and willing to pay the mortgage, but insists, first, that his title should be perfected according to the covenants in the deed poll.

1. The deed, the mortgage, and the deed poll, all bearing the same date, and relating to the same matter, are to be construed together as forming one transaction. 2 *Parsons on Con.* (5th ed.) 503, and cases cited in note; *Cornell v. Todd*, 2 *Denio* 130; *Flagg v. Munger*, 5 *Seld.* 483.

2. The covenants in the deed poll are conditions precedent to the payment of the mortgage, since they go to the whole of the consideration. 1 *Parsons on Con.* (5th ed.) 464; *Pepper v. Haight*, 20 *Barb.* 429.

(a.) These contingent interests which Shaw, by this deed poll, covenanted to get released to the defendant, were

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assignable, and might be released to the owners under the statute of March 14th, 1851, *Nix. Dig.* 149, as well as by the common law. 2 *Washburn on Real Prop.* 367, and cases cited.

(b.) The title to the whole of the property was defeasible, and the contract to perfect this title went, therefore, to the whole of the consideration.

(c.) The whole transaction shows that it was a contract to convey the entire estate, and the parties could have intended but one thing, i. e. that the conveyance of the entire estate should be a condition precedent to the payment of the mortgage. *Roffey v. Shallcross*, 4 *Madd. Ch.* 122; 1 *Esp.* 346; *Jackson v. Wass*, 11 *Johns.* 525.

(d.) The performance of these covenants and the conveyance of the entire estate, is thus "a condition going to the essence of the contract;" and the failure to perform this makes a total failure of consideration, and the mortgage given for this consideration of no effect. 2 *Parsons on Con.* (5th ed.) 464; *Lucas v. Godwin*, 3 *Bing. N. C.* 746.

3. A court of equity, in a case once properly before it, will do all in its power to settle the rights of all the parties justly and equitably, in one decree. *Couse v. Boyles*, 3 *Green's Ch.* 212.

(a.) The answer of the defendant admits the mortgage, and that he is ready and willing to pay it, as soon as his title to the land is perfected, according to the contract of the mortgagee and the intention of the parties. The bill, on the other hand, contains no such offer to perform on the part of the complainant.

(b.) Shaw has not performed his part of the agreement. Defendants' title is as defective now as when these deeds were given, and is liable, at any moment, to be swept from under him. Should this court now compel him to pay the mortgage, and Shaw die without issue, (and he has none now) he would lose his land and be left without a remedy, although having paid its full and entire value. *Shish v. Foster*, 1 *Ves.* 88; *Knapp v. Lee*, 3 *Pick.* 452.

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4. The general rule is conceded, that a court of equity will not entertain, as a defence to a mortgage, defect in title, since it is not the province of this court to go into an investigation of title, settle these issues of fact and law, and determine the title in this collateral way.

The rule must, however, be restrained and interpreted by the reasons upon which it is founded, and such has always been the ruling of our courts. *Coster v. Monroe Manf. Co.*, 1 *Green's Ch.* 467; *Couse v. Boyles*, 3 *Green's Ch.* 212.

(a.) In the former of these cases cited, the defect in title had been proven in an action at law, and was allowed as a defence to the mortgage, the court holding, not that a defect in title was no defence, but that it could not inquire into it. The defect, however, being established elsewhere, it was admitted as an equitable defence.

In the latter case, the defence of a deficiency in the number of acres sold was allowed, the court citing, with approbation, *Coster v. Monroe Manf. Co.*

(b.) Here the defect in title was admitted by the seller, and as a part of the terms of the sale he expressly covenants and agrees to cure the defect immediately. Is not the defect of title, therefore, clearly established, and does not the reasoning of *Coster v. Monroe Manf. Co.* apply equally here?

The court is not asked to go into an investigation of the title, but simply to allow it as a defence when it is admitted by the acts and covenants of the mortgagee, and to decree that these covenants, the performance of which was expressly made by the parties a condition precedent to the payment of the mortgage, should first be performed.

(c.) The case differs radically from that where a warranty deed only is taken. If a purchaser relies solely upon this, and enters into the enjoyment of the property, so long as he is protected in such enjoyment he clearly should not, and will not be permitted to allege defect in the title, and to set up speculative difficulties as a defence to the mortgage. Here, however, there is something more, i. e. the covenants in the deed poll, expressing, both actually and legally, the

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intent of the parties that the defect in the title should be cured before the mortgage becomes payable.

5. The assignee of the mortgage (the complainant) stands in the same position as the mortgagee, and took the mortgage subject to all the equities between the assignor and other parties, whether these equities be latent or not. *Conover v. Van Mater*, 3 C. E. Green 481.

6. The payment of the mortgage should, therefore, be suspended till the performance of the covenants in the deed poll, and the complainant's bill should be dismissed.

THE CHANCELLOR.

The suit is for the foreclosure of an ordinary mortgage. By the terms of it, both principal and interest are due. The defence is, that the mortgage was in part payment of the purchase money of the mortgaged premises, and given at the delivery of the deed; and that at the same time the mortgagee executed a covenant under seal to the purchaser, that he would immediately procure releases of their title from certain persons named, who were reputed to have some claim on the lands. That this covenant was part of the transaction of selling the land, and was in pursuance of the agreement by which the land was purchased, that it would not have been purchased without such agreement, and that the releases have never been procured.

The answer sets up that there was a verbal agreement, that the mortgage should not be due or payable until the releases were procured. But of this there is no proof whatever; the answer is no proof, as in this particular, it is not responsive to the bill, but sets up new matter in avoidance.

The covenant and mortgage must be construed together as part of one transaction, and as if they had been contained in the same instrument. And then the question is resolved into this, would the breach of a covenant by the mortgagee contained in a mortgage, preclude him from foreclosing it? The covenants in this case are independent. The mortgagee agreed to procure the releases forthwith, abso-

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lutely. The mortgagor agreed to pay the money at the stipulated time absolutely, and not on condition that the releases had been procured. These are not dependent covenants. If such had been the agreement or understanding, it would have been easy to have made the payment of the money, conditional on the releases being first procured. The mortgagee has a right to say *in hæc fœdera non veni*. He might have been willing to bind himself in a covenant to procure releases, which he knew were of little or no importance, a breach of which, if he should be unable to procure them, would subject him to small damages, but might be unwilling to bind himself to forfeit \$2500 of the purchase money, if he could not obtain the releases. The parties could have made the bargain either way. They chose to make, and did make, independent covenants. And there is no principle established in courts of equity, by which an effect will be given to such covenants, different from their legal effect, and independent covenants turned into conditional, because it will give better protection to a party, or will diminish litigation. The failure of the mortgagee to keep his covenant, is no defence to a suit for payment of the mortgage money.

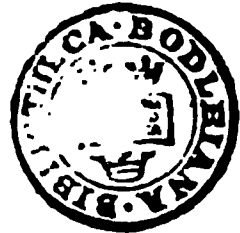
The question is not changed by the fact, that the complainant in this suit, is a *bona fide* purchaser of this mortgage for a valuable and full consideration, without notice of this covenant. He holds it subject to every equity and defence, to which it was subject in the hands of the mortgagee.

The defendant does not set up or rely upon any actual defect in the title, as a defence to this foreclosure. The complainant, by the documentary and parol proof which he has produced, insists upon it that he has shown a good title, and that the releases would be of no value. The defendant insists, that without regard to this, he is entitled to have the releases delivered before he can be called upon to pay the mortgage debt. The view taken by me of the case renders it unnecessary to examine and determine the validity

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of the title, but this insistment shows better than any argument, that it would be inequitable to change the covenants of the parties from what they were intended to be.

The complainant is entitled to a decree of foreclosure, and to a sale of the premises.



 COWART vs. PERRINE.

1. Upon replication filed to a plea that there was no promise within six years, an agreement not to take advantage of the statute of limitations, cannot be given in evidence; it is not within the issue. The only question is, whether there was any promise within six years.

2. The old practice would have allowed a rejoinder, that the defendants had agreed not to plead the statute. Now, a rejoinder is not allowed, but the promise should be alleged in the bill, and if omitted by inadvertence, the complainant would be allowed to amend.

3. A promise not to take advantage of the statute, made pending a negotiation for allowing further time to arbitrators to report, will not be construed to be an agreement never to take advantage of the statute, but to be an agreement that the statute should not run while the arbitration was pending. After that was revoked and at an end, the statute would begin to run.

4. The ruling in this case in 3 *C. E. Green* 454, that a submission to arbitration does not prevent the running of the statute of limitations, is not affected by the fact, that pending the submission, the right to sue was suspended.

This was a bill for account, by one of two former partners against the other. The defendant pleaded no promise within six years, and that no cause of action had arisen within six years; to this plea the complainant filed the common replication. The argument was had upon the pleadings and testimony taken upon both sides.

Mr. W. H. Vredenburg and *Mr. J. Parker*, for complainant.

Mr. G. D. W. Vroom and *Mr. P. D. Vroom*, for defendant.

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THE CHANCELLOR.

The bill sets forth a submission of any disputes that might arise in settling up the partnership affairs, to two arbitrators actually chosen, contained in the agreement for dissolution, executed March 5th, 1853. On the motion heretofore made to strike out the plea, it was held that a mere submission to arbitrators of matters upon which the arbitrators never acted, would not prevent the running of the statute of limitations during the continuance of the submission. 3 *C. E. Green* 454. This position is not affected by the point now urged, that the submission while it continued, suspended the right of action, upon the authority of the decisions in *Scott v. Avery*, in the House of Lords, 36 *Eng. L. & E.* 1, and of the Court of Queen's Bench, in *Russell v. Pellegrini*, 38 *Eng. L. & E.* 99.

In *Dekay v. Darrah's Admr's*, 2 *Green* 288, the Supreme Court of this state held, that the suspension of the right to sue an administrator for six months after the death of the intestate, did not prevent the running of the statute for that time. Nothing is shown that amounts to, or that could be construed into, a new promise, or an acknowledgment of a continuance of the indebtedness, or that the account was unsettled after the meeting in the court-house in 1860, which was more than seven years before the commencement of this suit. The last communication had by the defendant with any one, was in June, 1861, more than six years before the suit was commenced, and that was to say that he considered the whole matter as settled and finished.

It is urged that the defendant, in February, 1859, agreed that he would not take advantage of the statute of limitations; and therefore, that he should not be permitted to set up this plea. In the first place, that cannot be set up in this issue, which is simply whether any promise was made, or cause of action arose, within six years before the filing of the bill. That was the question decided in *Gaylord*

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v. *Van Loan*, 15 *Wend.* 308, on a replication of a new promise, to a plea of the statute of limitations.

This question would have been properly raised on the motion to strike out the plea, but no such agreement is set out in the bill, and therefore it was not considered. It could have been raised by amending the bill in this respect. Under the old practice, this could have been effected by a special replication; this practice is now entirely abandoned, and the object obtained by amending the bill, and setting out such bar to any such defence, by way of anticipation.

In this case leave would not have been granted to amend if applied for in time, upon such promise as is shown by the evidence.

It has been held that a defendant who has agreed not to set up the statute of limitations, shall not be allowed to do it; that such agreement, although it does not amount to a new promise, will operate by way of estoppel, in cases where the statute had not fully run, and the plaintiff forbore to sue in consequence of the promise. *Randon v. Toby*, 11 *How.* 493; *Utica Ins. Co. v. Bloodgood*, 4 *Wend.* 652; *Gaylord v. Van Loan*, *supra*.

In the first two cases there were express promises to pay the debt within the limited time, sufficient to maintain the actions, and the promises were in writing; and in the last the decision was not on that ground, though the dicta in the opinion support the principle of estoppel. To suspend the operation of a positive statute on a verbal agreement, by the doctrine of estoppel, seems to me a very dangerous application of it. I would hesitate to hold that a verbal bargain for the sale of land was binding, because the vendor said at the time, my word is as good as my bond; I will not set up the statute of frauds; and thus induced the purchaser to waive a written contract of sale.

But admitting that a parol agreement not to set up the statute of limitations, would, by estoppel, prevent the plea from being set up, yet the agreement shown in this case, is

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not sufficient to estop the defendant from setting it up in this suit.

He was asked to sign a written stipulation not to set up the statute of limitations, in February, 1859, when the statute had nearly run: he declined to sign it, because he wanted this matter to be brought to an end, and was not willing to postpone it indefinitely; such is the testimony of the complainant's witness. The defendant denies any agreement for that purpose. Taking this testimony of complainant's witness as true, it would be inequitable to give it the effect which the defendant said he was not willing it should have, and leave the matter open forever. The bar would be as good at the end of fifty years as it is now. It was evidently only intended to operate while the matter was in position to be brought before the arbitrators, and for a reasonable time afterwards. As long as this agreement really caused the complainant to delay a suit, it would come within the reasons on which an estoppel *in pais* is founded. When the act or promise of one man causes another to do, or forbear to do, something which he would otherwise have done, the other is estopped from taking advantage of the act or omission, caused by his own act or promise. In this case the defendant refused to meet, or go on with the settlement after March, 1860, and in June, 1861, expressly told the arbitrator to whom he had made the promise, that the matter was at an end. It is impossible to believe that the delay to bring suit after this, was occasioned by the promise not to set up the statute.

It would be most inequitable to give a promise made under the circumstances of this, the effect of keeping these accounts open indefinitely. I should be unwilling, under any circumstances, to extend such a promise by parol longer than six years from the making of it. For these reasons, had the application to amend been made at the proper time, I would have felt constrained to have refused it.

The bill must be dismissed.

Vanderveer's Administrator v. Holcomb.

VANDERVEER'S ADMINISTRATOR vs. HOLCOMB and others.

1. An interlocutory decree made at the hearing in a foreclosure suit, on bill and the answers of two defendants, one of which charged that the mortgage of the other defendant was void for usury, does not adjudicate upon the validity of such mortgage by not directing an account to be taken of the amount due upon it. The question between the two defendants is still open, and is proper to be brought up by a cross-bill.

2. A cross-bill against a complainant should, in general, be filed at the time of filing the answer, and in all cases before closing the testimony. But the first rule does not apply to a cross-bill by one defendant against another, nor does the last to cases in which no testimony has been taken.

The argument was upon a demurrer filed to the bill in this case, which was a cross-bill by one of the defendants in a former suit pending in this court.

Mr. Emery and *Mr. Richey*, in support of the demurrer.

Mr. Ransom, contra.

THE CHANCELLOR.

The cross-bill was by one of the defendants in a foreclosure suit against another defendant, for the purpose of establishing the validity of a mortgage held by the complainant in the cross-bill, to which the owner of the equity of redemption had, in his answer in the original suit, set up the defence of usury. The complainant in this suit, in his answer in the foreclosure suit, had set up his mortgage as a valid, subsisting lien, but did not notice the defence of usury. Both defendants admitted the complainant's mortgage; no replication was filed or testimony taken, but the cause was brought on for hearing on the bill and answers. The Chancellor, by an interlocutory order, directed a reference to a master to ascertain the amount due on the mortgage of the complainant, and on the encumbrances of other defendants, some of which were posterior to the mortgage of the complainant in

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the cross-bill. He did not direct the master to ascertain the amount due on the mortgage of the complainant in the cross-bill, or determine directly whether it was, or was not, a valid mortgage. The interlocutory decree was silent as to that. From this decree an appeal was taken, and it was affirmed in the Court of Appeals, (*Vanderveer v. Holcomb*, 2 C. E. Green 547,) on the ground that if it did, by implication, hold that the mortgage of the complainant in this bill was invalid, such judgment was right on a hearing upon bill and answer only, as the facts stated in Holcomb's answer setting up the usury, must be taken as true, and no denial of them was contained in the defendants answer; and on the other hand, if the decree appealed from did not, by implication, declare the mortgage void, but left the question open, there was no error.

I think that interlocutory decree did not affect the mortgage of the complainant in this suit. It simply directed the master to ascertain the amount due on the other encumbrances, which, no doubt, it was thought would be all that would be requisite to a final decree; as the cause then stood, it was all that was requisite; there was nothing to controvert the facts set up in Holcomb's answer; but if, before the final hearing, by cross-bill or otherwise, evidence should be placed before the court to show that the plea of usury was not true, then this report would have been insufficient, and a further reference might be ordered before the final hearing.

It is insisted, on the part of Holcomb, that this cross-bill is filed too late. The rule is, that in general a cross-bill should be filed at the time of the answer, as it is a part of the defence. And the old rule in England was, that it should be filed before publication, which would be substantially, in this state, before the closing of the testimony. But this last rule does not apply to this case, because there was no testimony taken. Nor does the rule first mentioned apply, for that relates to cases where the cross-bill is against the complainant; and in such case it is evidently proper that the cross-bill should be filed at the time of putting in

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the answer, to which it is an auxiliary. But where the dispute, as here, arises between two defendants, one of them cannot know what defence the other will put in until answer filed, and his own answer must be filed within the same time.

A cross-bill is proper in a case like this, between the defendants, and I do not know of any rule or reason, why it should not be filed after an interlocutory decree which does not determine the question.

The complainant in this suit ought to be permitted to call upon Holcomb to prove the defence of usury by other evidence than his own allegations in his answer, which, under the rule laid down in the statute, would be conclusive on the final hearing, and would warrant a decree that this mortgage was void for usury.

Demurrer overruled.

THE MONMOUTH COUNTY MUTUAL FIRE INSURANCE COMPANY v. HUTCHINSON AND THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANY.

1. Where an insurance company pays the insured for a loss by fire occasioned by the fault of a railroad company, and the insured afterwards receives the amount from the railroad company, in satisfaction of his damages, he holds it in trust for the insurers, and they may recover it from him by suit in equity.

2. If the railroad company does not pay the insured his damages, or pays them knowing that he has received the amount insured from the insurance company, the railroad company is liable to the insurance company in a suit at law, which it has the right to bring in the name of the insured, without his consent, to compel repayment of the damages to the amount of the sum paid by it; and a release by the insured to the railroad company would be no defence to such suit.

3. But these two remedies cannot be pursued in one suit; neither the insured nor the railroad company is a proper or necessary party to a suit against the other; and in no way are they jointly liable so that a decree could be made, or a judgment given against both.

4. When the suit is by bill against both, if the only prayer were for a

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decree for the payment of the money, a demurrer would be sustained for the misjoinder. But under the general prayer for relief, the bill will be retained to give such equitable relief as the facts may warrant.

5. A release by the insured to the railroad company, when the railroad company knew that the insured had received the amount of the insurance, would be a fraud upon the insurance company, and would be void for the fraud. And in such case, the insurance company has the right to have the release declared void before commencing a suit in the name of the insured against the railroad company. In such a suit against the railroad company which holds the release, the insured would be a proper, if not a necessary party.

6. Courts of equity have, peculiarly, cognizance of matters of fraud, and have jurisdiction over instruments affected by fraud, and will declare them void on that account, even though the fraud is such as might be proved at law so as to avoid the effect of the instrument.

This cause was argued upon separate demurrers, filed by each defendant to the complainants' bill.

Mr. Emery and Mr. Richey, for Hutchinson.

Mr. C. E. Green and Mr. Stockton, for the railroad company.

The bill alleges that, on the 11th of June, 1861, The Monmouth County Mutual Fire Insurance Company delivered to Hutchinson, one of the defendants, a policy of insurance, by which they agreed to indemnify him "for all damages or loss which he might sustain" for a specified time, "not exceeding the sum of \$1200, by reason of fire happening" to the house insured. That they insured also another house for \$400, and a shed for \$200. That, on the 5th day of March, 1866, the houses and shed described in the policies were destroyed, and were a total loss. That, on the 21st day of March, 1866, Hutchinson made oath to the destruction of the property by fire, and that it was worth, at the time, \$4000, and that the fire did not take place from any cause which invalidated the insurance. That on the 9th of May, 1866, the insurance company paid Hutchinson \$1800, in accordance with their agreement.

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The bill further alleges that, since that payment, they **have** discovered that the fire was caused by the carelessness, **mis**management, negligence, and default of The Camden and Amboy Railroad and Transportation Company. After **stating** in what respect the railroad company were negligent, **the** bill states that, by reason thereof, Hutchinson had an **action** for damages caused by the said fire against The Camden and Amboy Railroad and Transportation Company, for **the** full value thereof, which complainants charge were **worth** \$4000.

Complainants further show, by their bill, that, after the **happening** of the fire and their payment of the \$1800, they **became** entitled to all the rights of action which Hutchinson **had** against the Camden and Amboy railroad, to the extent **of** the sum of \$1800, and had a right to be subrogated **to** the rights and remedies he had against The Camden and Amboy Railroad and Transportation Company, to the same **e**xtent. That the payment of the \$1800 to Hutchinson, **o**perated as an equitable assignment to complainants of so **m**uch of the claim of Hutchinson against the company, as **w**as necessary to reimburse them; and that Hutchinson **b**ecame a trustee for them for so much of the claim as was **n**ecessary to reimburse them; and that he had no right to **r**elease The Camden and Amboy Railroad and Transportation Company from any right of action complainants had **a**gainst the said railroad company.

It is further alleged, on information and belief, that, on **the** 13th of November, 1866, the railroad company paid Hutchinson the sum of \$2000 as satisfaction of the **d**amages sustained by him on account of the said fire, and that Hutchinson holds the said money as trustee for complainants **t**o reimburse the said \$1800 paid by them. That *if* Hutchinson gave a receipt and release, it was a fraud on complainants, and the railroad company were cognizant of it, and cannot lawfully set up the release as a discharge.

The bill prays, that defendants may be decreed to account to complainants for the \$1800, and for general relief.

CASES IN CHANCERY.

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The demurrer must be sustained—

1st. Because this court has no jurisdiction of the case, as stated in the bill.

2d. Because the bill is multifarious.

3d. Because there is no equity in the bill.

1st. The court has no jurisdiction of the case, as stated in the bill. The complainant either has no remedy, or, if he has one, has not resorted to it.

The assured could only recover against the railroad company on the ground that the fire was accidental and caused by their negligence, and that it was so is charged in this bill. But this was exactly the risk which the insurance company took, and for which they received the premium, as stated in the bill. The insurance company agreed to indemnify the assured against all damages or loss which he might sustain. If he sustains a loss which he need not have done, by reason of his failure to prosecute a party liable, the company may, perhaps, resist payment on that ground, but he must first establish the liability of the railroad company. This liability is fixed and absolute in Massachusetts, and other states, by act of legislature, and therefore the insurance company are held to be subrogated in such cases to the rights of the assured after paying him the amount due on the policy, and they may maintain an action at law in the name of the assured. But, in New Jersey, and other states, where there is no act making the company absolutely liable, the amount and extent of the liability to the assured, as well as the fact, must be ascertained before the insurer can claim to be subrogated to his rights.

If the assured has released an uncertain liability, and this is a bar, no injustice is done the insurance company—this was the risk they took. And if they have paid the assured when there was no necessary loss, and when not liable, it was their own mistake; their remedy is by an action on the case against him to recover back money paid by mistake.

There is no privity between the railroad company and the insurance company, and no subrogation can give the insur-

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ance company a right the assured does not possess. *Suppose the railroad company, instead of paying a part and getting a release, had paid the whole and obtained a release, the case would not be altered at all*, yet it would not then be insisted that the insurance company, who had paid the policy, could recover it back from the assured by filing a bill against the railroad company, who had already paid *the whole loss*. If the railroad company were not liable for the fire to the assured, of course they are not liable in this action. If they are liable, the bill states that they satisfied the liability, and have been released by the party to whom they were liable.

If the insurance company paid when there was no loss, (this is the inference from the bill,) then the remedy is an action at law to recover from the assured money paid by mistake.

The payment of \$2000 to Hutchinson by the company, is a bar to any right of recovery by Hutchinson against the company, as much as if a judgment had been obtained or an award made for the amount, and Hutchinson had received it either under the execution or award.

Hutchinson could, therefore, recover nothing more; nor can the insurance company, for they are entitled only to the rights and remedies of Hutchinson. If the release then be valid, the insurance company has no claim upon the railroad company.

If, on the other hand, there is fraud, and this release is invalid, the insurance company has a right of action at law, in the name of Hutchinson against the railroad company, to which the release is no bar. *Hart v. Western R. Co.*, 13 Metc. 99, 108, and cases cited on last page. In this case it was held, that whereas, under the Massachusetts statute, the owner of the house was entitled to recover absolutely of the railroad company, that if he received payment from the insurance company, they could use his name to recover the money back from the railroad company in an action at law. The present bill is filed against the party into whose rights

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they allege they are subrogated, and whose name they should use in an action at law to recover the money, if they can recover it at all. *Phillips v. Clagett*, 11 *Mees. & Wels.* 84; Lord Abinger, bottom page 89; Parke, B., page 92, half way down.

The complainants' relief, therefore, being plain, complete, and adequate at law, equity will not entertain jurisdiction. 1 *Story's Eq. Jur.*, §§ 33, 49; *Mitford on Pl.*, ch. 2, p. 123; *Mosely*, 83; *Hoagland v. Delaware*, 2 *C. E. Green* 106, top of page 115; *Law v. Thorndike*, 20 *Pick.* 320; 1 *Johns. Ch.* 463; 4 *Johns. Ch.* 566.

There is nothing to give a court of equity jurisdiction. There is no prayer for discovery, and none needed for complainants' relief. The railroad company are not trustees. If they still held the money in their hands, then, upon the authority of *Randall v. Cochran*, 1 *Ves., sen.*, 98, and other cases based upon this case, this court would have jurisdiction. But the railroad company has paid the money over into the hands of Hutchinson. He is trustee. He is, therefore, within the jurisdiction of this court. He may be made to account. He falls directly within the principle of the cases where, though a court of law might have jurisdiction, and an assumpsit be maintained against the trustee for moneys he had received, yet equity retains the case, having concurrent jurisdiction. *Varet v. N. Y. Ins. Co.*, 7 *Paige* 567; *Hart v. Western R. Co.*, 13 *Metc.* 107; *N. Y. Ins. Co. v. Roulet*, 24 *Wend.* 505; 1 *Eden* 130; 1 *Younge & Coll.*, *Exch.* 500.

2. The bill is multifarious.

Neither the parties nor the subject matter are properly joined. The bill charges that complainants were subrogated into the rights of Hutchinson, and have a right to proceed on his claim. Yet the bill is filed against *him*, and he is charged as holding the \$1800 paid him by the insurance company, as well as the \$2000 paid him by the railroad company, in trust for complainants. At the same time the

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railroad company are charged with holding the whole amount of damages incurred, in trust for complainants from the time of their payment of the \$1800; and an account is prayed against both defendants for the \$1800. The positions are inconsistent with one another. The complainant has adopted a wrong course in the very frame of the bill, by uniting distinct matters against different defendants.

3. There is no equity in the bill.

The railroad company have made satisfaction to Hutchinson, and are not liable, therefore, to the insurance company. *Propeller Monticello v. Mollison*, 17 How. 155.

The clear distinction is, that where the party by whose negligence the loss has occurred, has not paid over the money to the assured, the insurers who paid the loss under the contract of insurance, are subrogated to the rights of the assured, and may bring an action in his name at law, or may maintain bill in equity in their own name. But where such loss has been paid to assured, then the action is by bill in equity against the assured, or assumpsit for money had and received.

Here the money is paid. This bill should, therefore, be dismissed as to the railroad company.

In *Randall v. Cochran*, 1 Ves. 98, and *White v. Dobinson*, 14 Sim. 273, the money had not been paid over; it was still in the hands (in the latter case) of the party doing the damage, and restrained by bill from being paid over to party injured, the insurer having before then paid the amount due under his contract of insurance. See also *Garrison v. Memphis Ins. Co.*, 19 How. 312.

See also, 37 Ill. 333; 8 Johns. R. 246; 16 Wend. 397; 5 Paige 285.

If the assured receives payment from the insurance company first, and afterwards receives payment from some person primarily liable, the sum received by the assured is in the nature of salvage, which he holds as trustee for the underwriters who had paid the loss. But, in such case, this

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is no subrogation, for the assured has no rights left against the party primarily liable into which the assurer can be subrogated: but the remedy is against the trustee who holds for him. *Enna Fire Ins. Co. v. Tyler*, 16 Wend. 397; *Angell on Insurance*, § 66.

There can be no subrogation unless there be a debt, unless there be a sum certain, as in case of advances by a consignee or a policy on the life of the debtor. The fact that the assured might have had an action for damages against the company when the result was uncertain, does not subrogate the insurer into any right at all after this right of action is compromised by the party having it: and if he is substituted into any right at all, it is only the right to bring the action in the name of the assured, which was the only right the assured ever had against the railroad company.

The rule is laid down by Phillips—"When the insurable interest consists of a debt due to the assured, as in case of advances made by a consignee, or a policy on the life of a debtor, the assured is bound, no doubt, to assign to the underwriters his debt or his insurable interest, whichever it may be, in case of its being proved a total loss." 2 *Phil. on Ins.* 282; *Angell on Ins.*, (2d ed.,) p. 118, and note.

So, if a policy of insurance should be made in the name of an agent or trustee, and a loss should occur, and the agent or trustee should refuse to sue thereon, a bill for relief, suggesting these facts, and making the agent or trustee and the underwriters parties, would be demurrable, because the proper remedy is at law: for, on any such policy, if made in the name of an agent for the benefit of the principal, the principal may sue in his own name. *Story's Eq. Pl.*, § 489; *Diegeton v. London Assurance Co.*, *Masely* 83; *Mitford's Eq. Pl.*, 123; *Mortimer v. London Assurance Co.*, 1 Atk. 547.

There is no privity whatever between the railroad company and the insurance company. The railroad company had the perfect right to compromise a doubtful claim of damages for an accidental fire, and the receipt and release of

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the party claiming is an absolute bar to any claim, legal or equitable, after the money is paid. The bill states no case of fraud; but, on the contrary, does not state that a release was given, but simply that *if* it was given, it was a fraud; but if the inference be that a release was given, the circumstances as stated in the bill disprove any fraud in the transaction. There is no charge of fraud such as to justify the interference of a court of equity. The railroad company paid fifty per cent. to a party who charged that his property was destroyed by fire occasioned by their negligence, as a compromise of a doubtful claim. They are in precisely the same position as if they had paid the whole \$4000, which they certainly had a right to do. More, they are in precisely the same position as if a verdict and judgment had been obtained and given for the \$4000. True, the assured was indemnified by the policy only against "*a loss he might sustain.*" And, if he first received \$1800 from the insurance company, and subsequently the full amount by verdict and judgment and execution from the railroad company, then the insurance company paid the \$1800 under a mistake. It may be that the fire did not take place from any cause which invalidated the insurance, and if so, that matter can be fully investigated by the appropriate remedy—an action on the case to recover money paid by mistake.

A person is not properly a party to a suit between whom and the plaintiff there is no proper privity or common interest; but his liability, if any, is to another person. And there is no such collusion or fraud charged as would except this case from the general rule. *Story's Eq. Pl.*, § 227.

Complainant has no right to call upon the railroad company to answer his demand. *Story's Eq. Pl.*, § 513.

Mr. J. Parker, for complainants.

THE CHANCELLOR.

The bill states that the complainants insured the dwelling-house and store-house of the defendant, Hutchinson, against

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loss by fire, to the amount of \$1800, and while so insured the buildings were destroyed by fire on the 5th day of March, 1866; that the value of the buildings destroyed was \$4000; and that the complainants, on the 9th of May, 1866 paid to Hutchinson \$1800 for his loss. The bill further states that the fire was communicated to the buildings by sparks from the locomotives of the defendants, the Camden and Amboy Railroad Company, running on their road near the buildings, and that the fire was caused by the negligence of the company's servants; that the company was liable for the loss occasioned by the fire; that the complainants having paid to Hutchinson the insurance, were, to that amount, subrogated in his place in the claim against the railroad company, and entitled to recover it from them in Hutchinson's name; that the company, in November, 1866 knowing that the complainants had paid this insurance settled the claim of Hutchinson with him, paid him \$2000 in full for his damages, and Hutchinson released and discharged them from all further liability. The complainants claim that Hutchinson holds \$1800 of the amount received in trust for them, and is bound to account to them for it; that the settlement between the defendants, and the release and discharge, was a fraud on the complainants, and cannot be lawfully set up against them. The prayer of the bill is that the defendants may be decreed to pay to the complainants the sum paid by them to Hutchinson, with interest and to this is added the general prayer.

The cause of demurrer assigned in the demurrers filed, is want of equity in the bill; but in addition to this, on the argument, the defendants urged and assigned *ore tenus* as a ground of demurrer, that there is a misjoinder; that the right of action, if any, against Hutchinson is in equity, and against the railroad company at law, and that both defendants could not be joined, either in law or equity.

It is settled, and was not disputed on the argument, that if the complainants paid Hutchinson for a loss by fire, occasioned by the fault of the railroad company, and afterwards

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Hutchinson received the amount from the railroad company in satisfaction of his damages, he holds it in trust for the insurers, and they may recover it from him by suit in equity. 2 *Phillips on Ins.*, §§ 1723, 1734; *Blauwpot v. Da Costa*, 1 *Eden* 130; *Randall v. Cochran*, 1 *Ves., sen.*, 98; *Varet v. N. Y. Ins. Co.*, 7 *Paige* 567.

It is also settled, that if the railroad company had not paid Hutchinson his damages, or had paid them to him, knowing that he had received the amount insured from the complainants, that they are liable to the complainants in a suit at law, which they have the right to bring in the name of Hutchinson, without his consent, to repay them the damages to the amount of the sum paid by them, and that a release by Hutchinson would be no defence to such suit. *Hart v. The Western Railroad Co.*, 13 *Metc.* 99; *Tyler v. Ætna Fire Ins. Co.*, 16 *Wend.* 397; *Gracie v. N. Y. Ins. Co.*, 8 *Johns.* 245; *Timan v. Leland*, 6 *Hill* 237; 2 *Phillips on Ins.*, § 1711.

But these two remedies cannot be pursued in one suit, and neither defendant is a proper or necessary party to a suit against the other; and in no way are they jointly liable, so that a decree may be made, or a judgment given against both; and were there no other prayer than that they be decreed to pay the money to the complainants, the demurrers would be sustained for the misjoinder. But the prayer for general relief will entitle the complainants to any equitable relief warranted by the facts set out in the bill. The settlement by the railroad company with Hutchinson; after they knew that he had received the amount of the insurance, was a fraud upon the complainants, and the release given to them would be void for the fraud. Courts of equity have, peculiarly, cognizance of matters of fraud, and have jurisdiction over instruments affected by fraud, and will declare them void on that account; and this, even although the fraud is such as might be proved at law, so as to avoid the effect of the instrument. The release stated in the bill, if given under the circumstances there stated, is void as against the claim of the complainants, so far as the amount paid by

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them is concerned, and it is void for fraud, and they have the right to have it declared void before commencing a suit in the name of Hutchinson against the railroad company. It is a suit for that purpose, which must be brought against the company who hold the instrument, Hutchinson is a proper party, if not a necessary party. He participated in the fraud and received the benefit of it.

The demurrers must, therefore, be overruled. The complainants were permitted to amend their bill at the argument, on the terms that the costs of the demurrers, if the demurrers should be overruled, should abide the event of the suit.

HAUGHWOUT and POMEROY vs. MURPHY.

1. *Lis pendens* only take effect from the service of the subpoena. The statute provides that the suit shall not be notice until the filing of the notice required by the statute, but gives no effect to the notice. It only restrains its effect.

2. A person who has contracted for the purchase of land, may compel a person who, after such contract and with notice of it, takes the legal title from the vendor, to perform the contract. The subsequent purchaser, who holds the title against such contract of sale, must be a *bona fide* purchaser without notice, and must have paid the purchase money.

3. If part of the purchase money remains unpaid after the sale, as to such part such second purchaser is not protected, but it may be claimed by the prior purchaser. But in such case the purchaser will hold the legal title conveyed to him free from any claim under the prior contract, except to the purchase money not paid until after notice of the contract.

4. That a mortgage was given as security for the payment of the unpaid purchase money, is not sufficient to protect such subsequent purchaser. The purchaser is only protected as to money actually paid before notice.¹

5. A delay of two years and a half not accounted for in bringing suit to compel specific performance, is fatal to relief.

This cause was argued upon pleadings and proofs.

Mr. Pitney, for complainants.

Mr. Vanatta, for defendant.

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THE CHANCELLOR.

The bill is filed to enforce the specific performance of a contract to convey lands. In September, 1863, A. Boisaubin agreed, in writing, with the complainant, Haughwout, that he would convey to him a tract of land containing twenty-two acres, known as the Spencer Wood, for \$200 per acre, and gave Haughwout until March 1st, 1864, to accept the proposition. Haughwout accepted it on the last day of February, 1864. A deed was about this time prepared from Boisaubin to Haughwout for this tract, but for some reason which does not appear, it was not executed or delivered. There is no proof that anything was done by either party in fulfillment of the contract, or to demand its execution by the other, until August 31st, 1865; during this time Boisaubin had publicly, by a placard set up on the tract, advertised it for sale in lots. Lots were sold to several purchasers. And on the 7th of August, 1865, Murphy, the defendant, purchased of Boisaubin for \$600, three lots, the property in question in this suit. The conveyance was made and delivered on that day, and \$400, part of the consideration, was paid on delivery of the deed; a mortgage for \$200, the residue of the consideration, was executed and acknowledged on August 19th, but not then delivered. On the 20th of August, Murphy found that two prior mortgages on the whole tract had not been canceled of record, and went to see Boisaubin about it. Boisaubin said they were satisfied, and he supposed they were canceled. He promised to see to it, and handed to Murphy \$400, which he insisted on his taking and keeping until these mortgages should be canceled of record. He found, upon inquiry, that releases of these three lots from the two mortgages had been properly executed, but, by some inadvertence, had not been recorded, and brought a note, dated August 29th, from Mr. Dalrimple, his counsel, to Murphy, stating that the mortgages were canceled and released. This note was delivered to Murphy by Boisaubin on the evening of the 29th or 30th of August, when the \$400 was handed back to Boisaubin, and the next

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day Murphy delivered to him the mortgage for the \$200. About these dates there is some uncertainty, and some discrepancy in the evidence of both Murphy and Boisaubin, and especially between their evidence in this suit, and in that heretofore brought by Haughwout against Boisaubin. But, upon a careful examination of the whole, I am satisfied that it establishes the facts as I have stated them. On the 31st of August, Haughwout filed a bill in this court against Boisaubin, to compel a conveyance of the whole tract, but did not make Murphy a party. A notice of *lis pendens* was filed in the county clerk's office, September 1st, 1865. It does not appear that any subpoena was issued or served. It is from the service of the subpoena only that *lis pendens* has effect. *Murray v. Ballou*, 1 Johns. Ch. R. 576. The statute (*Nix. Dig.* 112, § 57,) does not give any effect to the notice required to be filed by it, but declares that the suit shall not be notice until such filing.

Murphy had no notice of the contract with Haughwout at the time of the conveyance and payment of the \$400. But it is contended that he had power to retain the \$400 given to him by Boisaubin, and that, waiving such power, he paid it back to him after he had notice of Haughwout's claim. The \$400 handed to him by Boisaubin was for a specific purpose; it was a pledge that Boisaubin would free the property from the mortgages. It was not given to refund the purchase money, or to rescind the sale and take back the property. Like any other pledge, it must be delivered up when the purpose for which it was given was accomplished. Murphy had no claim or lien upon it for any other object, whether connected with the purchase or not. He was bound, both in conscience and in law, to return it, and the contract with Haughwout would have been no defence at law to a suit for this \$400, any more than if a watch or diamond had been pledged.

Murphy then must be held to have taken his title, and to have paid \$400, being two-thirds of the consideration money, before any notice of the claim of Haughwout, or the con-

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tract on which that claim was founded. There is no question, but that a person to whom the owners of land have contracted to sell it, may compel any one, who, after such contract and with notice of it, takes the legal title from the vendor, to perform the contract. Such person, to hold the title against such contract of sale, must be a *bona fide* purchaser, without notice, and must have paid the purchase money. If part remains unpaid after the sale, as to such part he is not protected, but it may be claimed by the prior purchaser. But in such case, as was held by Justice Story in the important and well considered case of *Flagg v. Mann et al.*, 2 Sumner 566, the purchaser will hold the legal title conveyed to him free from any claim under the prior contract, except to the purchase money not paid until after notice of the contract.

This narrows the case to the claim of the complainants to have the \$200, secured by the mortgage, appropriated to their claim. It is held that a *bona fide* purchaser without notice is only protected so far as the purchase money is actually paid before notice. That securities have been given for the payment is not sufficient to protect him. The lien of the purchaser under the prior contract would be a sufficient defence to those securities, and the grantee ought not to pay them. In this case the mortgage itself was delivered to Boisaubin after the notice in the conversation with Dalrimple. I consider it very doubtful whether the vague notice from Dalrimple was sufficient to put Murphy on his inquiry, but I shall assume that it was sufficient for the purpose of this decision.

But the complainant has been guilty of laches in bringing his suit for the lots in question in this cause. On the thirty-first of October, 1865, he had notice that Murphy had purchased these lots, and claimed to hold them, and that as to them Boisaubin could not give a legal title. He did not, so far as appears, make any demand on Murphy, until March 24th, 1868, and did not file his bill until after that. He suffered two years and a half to elapse, in which Murphy

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did not know whether he would be called on to convey three lots. In the mean time the mortgage became due. Murphy paid it. It is at least doubtful whether he could have offered a legal defence to it, for the title to him was good, unless Haughwout should bring specific performance.

It is the doctrine of equity that specific performance not be decreed in favor of a complainant who is guilty of laches, either in performing his part of a contract or in applying to the court for relief. *Fry on Sp. Perf.* §§ 730, 732, 736, 737. Lord Chancellor Cranworth in *Eade v. Williams*, 4 DeG. McN. & G. 691: "Specific performance is relief which this court will not give in cases where the parties seeking it come promptly soon as the nature of the case will permit." And he said, with approbation, *Watson v. Reid*, 1 Russ. & M. 100, which Sir John Leach, considered a delay of twelve unaccounted for, a ground to refuse relief; and *South v. The Bishop of Exeter*, 6 Harc 213, in which Vice-Chancellor Wigram held, that delay in bringing suit from February, 1842, to August, 1843, was fatal to relief.

Murphy might have been made a party to the bill against Boisaubin: he was a proper, if not a necessary party, as his deed was not known to Haughwout at the filing of the bill. He had notice by the filing of the answer in October, 1865, stating the giving of this deed, and might then have amended his bill so as to make Murphy a party, or he might then have commenced suit against him. The final decree in that suit was in March, 1867, and this suit was not commenced until more than a year after that. This delay is unaccounted for: there does not appear to exist any reason for it: it is mere laches.

The only claim that exists is for the \$200, and it might be presumed that all damages sustained by not conveying these lots would be adjusted in the suit with Boisaubin. It is probable that a suit would not be brought against him for that. No claim was made on him for any deficiency of Boisaubin.

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in paying the damages, nor does it appear by any evidence that any such deficiency exists which would absorb this \$200, if it had not been paid.

In addition to these facts, this mortgage for \$200 was bought up by Davidson, a partner of Haughwout, by the advice and under the direction of Haughwout's counsel, and at his request; I do not doubt but with Davidson's own money, but for the benefit of Haughwout. It was held and controlled by the counsel of Haughwout in such manner as leaves no room to doubt that it was so bought and controlled for his benefit alone. The mortgage was assigned to Davidson as collateral to the principal mortgages which he purchased at the same time, for which he paid only \$5800, being the amount due on them. Murphy paid this \$200 to Haughwout's counsel, nominally for the use of Davidson, but it really went to Haughwout, who paid Davidson only the \$5800 paid by him for the principal mortgages. The evidence is somewhat confused, but I am convinced that the amount of \$200, secured by this mortgage, was actually received by Haughwout. And it would be highly inequitable, under such circumstances, to allow him, in any way, to compel Murphy to pay the same a second time.

The bill must be dismissed.

RENTON vs. MARYOTT and others.

1. When \$1000 of the money which a mortgage was given to secure consisted in shares of a mining company, accepted by the mortgagor, on the representation of the mortgagee that he had paid that much for it, but without misrepresentation or fraud by the mortgagee, the \$1000 will not be deducted from the mortgage.

2. The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud.

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Mr. J. W. Taylor, for complainant.

The bill is filed to foreclose two mortgages; one given Maryott to complainant for \$6000, dated January 12th, 1867, acknowledged same day, registered June 19th, 1867; the other by the same to the same, for \$9000 (on which only \$3000 is claimed to be due, besides interest,) dated February 1st, 1867, acknowledged February 5th, and registered February 12th; both on lands in Roxbury township, in the county of Morris.

The defence to the first mortgage is, simply, that there is a failure of consideration as to \$1000 of the amount, a part of the loan being six hundred and twenty-five shares of stock which defendant took in lieu of \$1000, on the assurance of the complainant that it was worth that, but which the defendant alleges was worthless.

This allegation not being responsive to the bill, must be clearly proved by the defendant, independently of any answer. The only proof adduced is his own testimony which is not only unsatisfactory in itself, but is flatly contradicted by both the complainant and Edwin Ross.

The defence to the second mortgage is: 1. That it was never delivered. 2. That only \$3000 was loaned on it. That the complainant refused to loan the balance of \$6000 as it is alleged he agreed to do.

As to the first defence: The mortgage being in the complainant's possession, duly executed, acknowledged, and registered, furnishes a presumption strongly in favor of delivery and which is not to be overcome by the uncorroborated testimony of the defendant. 2 *Washburn on Real Prop.*, (ed.) p. 608, § 31, and cases cited; 2 *Greenl. Ev.*, § 29; *Commercial Bank v. Reckless*, 1 *Halst. Ch. R.* 650; *Benson v. Wolverton*, 2 *McCarter* 158. Besides, the delivery is proved by the complainant.

As to the second defence: It is admitted; only the amount actually loaned, with interest, is claimed.

As to the third defence: It is utterly contradicted and overcome by the testimony of the complainant, who swears

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that he agreed to loan the \$6000 (balance) on certain conditions, which the defendant refused to perform. The defendant's answer is not evidence on this point. He is obliged to make out his defence clearly, the *onus probandi* being on him.

Mr. C. E. Scofield, for defendants.

We contend that Renton can recover only \$5000 on the first mortgage, without costs or interest. The contract now attempted to be enforced by him is usurious. Act of April 2th, 1864. *Nix. Dig.* 439, § 1.

The evidence plainly shows that the stock which Renton put off on Maryott was utterly worthless, and defendant contends that the transaction should be treated as if Renton had reserved to himself \$1000 more than legal interest at the time he accepted the \$6000 mortgage; and that Renton cannot evade the statute by the plea that he has devised. This view is sustained by the Chancellor in *Grosvenor v. The Flax and Hemp Manuf. Co.*, 1 *Green's Ch. R.* 453; a case very much like this. See also *Bank of the United States v. Owens*, 2 *Pct.* 527.

THE CHANCELLOR.

The defendant, Maryott, in February, 1867, applied to the complainant to borrow \$6000 on the note of one Jacobs to him. The complainant agreed to take the note, and advance \$5000 in cash, and transfer six hundred and twenty-five shares of a mining company, if Maryott would take them for \$1000, the price which he stated that he had paid for them. He required Maryott to endorse the note, and to give a mortgage as security for its payment. The note was endorsed by Maryott and one Edwin Ross, and a mortgage given to secure the payment of it. This is one of the mortgages sought to be foreclosed in this suit. Maryott alleges that Renton represented to him that this mining stock was worth \$1284, and that he, Renton, would take it back at \$1000, and that it is worthless; and asks that the amount

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of \$1000, for which it was taken, should be deducted from the mortgage.

Renton denies that he made any statement as to the value of the stock, but only said that he paid \$1000 for it, which he testifies was the fact, and denies that he ever agreed to take it back. Edwin Ross, who was present at the agreement and its consummation, confirms Renton, and says that he made no representation of its value, and no agreement to take it back.

The burden of proof to show fraud or misrepresentation is upon the defendant. He alone testifies to the representations; he is contradicted by Renton and Ross, and is not supported by any circumstances. That the stock was of little or no value, cannot effect the validity of the mortgage, or create an equity, to have a deduction from the amount for which it was given. The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud. Here, although the stock was worthless, there is not sufficient proof of any representation of its value, or any act that would amount to fraud, either at law or in equity. The complainant is entitled to the full amount secured by the first mortgage, with interest; and on the second mortgage for \$9000, to the amount actually advanced, with interest.

STILLMAN'S EXECUTORS vs. STILLMAN and others.

1. A mortgage given by a partner, after the failure of the firm, to secure a debt justly due to an individual creditor, is not necessarily tainted with fraud, by the fact that no charge was ever made or bill presented until the mortgagor was alarmed by prospective embarrassments, and that the account was made out, and charges agreed upon for this very mortgage.

2. A subsequent or even cotemporaneous attempt to convey or encumber property, so as to delay creditors, cannot affect a mortgage fairly given to secure a *bona fide* creditor.

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3. The purchase of a mortgage by the executors of the mortgagor, where the mortgaged premises are owned by a third party, does not satisfy it.

4. One may purchase his own mortgage on land that he has sold, and although such purchase may render the bond unavailing, yet where lands are conveyed subject to the mortgage as part of the consideration, the mortgage is the principal security, and even if the obligor pay the bond, he is entitled to be subrogated as to the mortgage, and to be repaid out of the land what he has paid on his own bond.

5. Where mortgaged premises are conveyed subject to a mortgage, and the grantee conveys the premises in two parcels, and the parcel last conveyed is released from the mortgage, the other parcel must pay such proportion of the amount due on the mortgage, as its value bore to the value of the whole tract at the time of the conveyance of such parcel.

This cause was argued upon bill, answer, replication, and proofs.

Mr. Williamson and *Mr. E. W. Runyon*, for complainants.

Mr. Keasbey, for defendants.

THE CHANCELLOR.

The bill is to foreclose a mortgage given by Thomas B. Stillman, the complainants' testator, for about \$1700, to Charles H. Stillman, on the first of September, 1857. This mortgage was assigned to the complainants by C. H. Stillman, after the death of their testator. In a short time after giving the mortgage, T. B. Stillman conveyed the mortgaged premises to C. A. Minor, who conveyed part to Joseph Stillman; both these conveyances were made expressly subject to this mortgage. Minor conveyed the residue of the mortgaged premises to Susanna, wife of Thomas; after his death, she conveyed part to one Ackerman, and another part to the complainants as executors. The complainants released the part conveyed to Ackerman from the mortgage.

The suit is against the heirs of Joseph Stillman, who died in 1860, intestate, and is to foreclose and sell the part con-

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veyed to him. The defence is, that the mortgage was without consideration, and was made to defraud the creditors of Thomas, also that it is satisfied by being assigned to the complainants, executors of the mortgagor.

The only evidence offered to show the consideration of the mortgage, is the testimony of Charles H. Stillman. He testifies that he was a brother of Thomas; that Thomas was one of the firm of Stillman, Allen & Co., who carried on the Novelty Iron Works, in the city of New York; that at the request of Thomas, and with the understanding that he should be paid for it, he took charge of his brother's estate at Plainfield, and spent a good deal of his time about his business, about one-fifth of his time; that he was at that time, by his practice as a physician, making about \$3000 a year; that after the failure of the firm in August, 1857, Thomas, although he had retired from the firm a year before its failure, fearing that he might be liable for the debts, was anxious to secure his individual creditors, and requested him, Charles, to present his account; that he made out the account for which this mortgage was given, by charging \$500 yearly for his services, a sum agreed upon at that time between him and Thomas, as a proper compensation, and charging the money he had expended in the affairs of Thomas; and he swears that this debt was justly due to him. This proof, if true, clears the mortgage from any imputation of fraud. But the defendants attempt to impeach the testimony of Charles, by a letter which he wrote to one of them in 1868, while he held the mortgage, and by two letters written by Thomas, after he had given the mortgage to Charles. These letters do not show any fraud in giving this mortgage, or in any way conflict with the testimony of Charles as to the consideration. It may be inferred from them, that two other mortgages, one for \$5600, given to Charles, and one for \$4500, given to John Harris, ten days after the mortgage in question, were given to delay the creditors of the firm in reaching the property of Thomas. But a subsequent or even contemporaneous attempt to convey

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or encumber property so as to delay creditors, cannot affect a mortgage fairly given to secure a *bona fide* creditor. Some suspicion is thrown over the *bona fides* of the debt to Charles, by the fact that no charge was ever made, or bill presented, until Thomas was alarmed by prospective embarrassments, and that the account was made out, and the charges agreed upon for this very mortgage. But it was natural that a man of large wealth and extended business as Thomas was, should ask his brother to take charge of his property and affairs in the country, with the understanding of both, that proper compensation should be made, and without having any price agreed upon. Thomas had no children, and might have designed to reward Charles by a munificent gift or legacy. And when a crisis arrived unexpectedly, such that the power of making compensation might be taken away unless done immediately, there was no fraud in forthwith agreeing upon a sum as compensation, and securing it by mortgage. I see no sufficient reason to discredit the positive evidence of Charles as to the whole transaction.

The transfer of the mortgage to the executors of the mortgagor does not satisfy it. The land was owned by a third person, and the mortgage was a valid encumbrance upon it. One may purchase his own mortgage on land that he has sold, and although such purchase may render the bond unavailing, yet where lands are conveyed as these were, subject to the mortgage as part of the consideration, the mortgage is the principal security, and even if the obligor pays the bond, he is entitled to be subrogated as to the mortgage, and to be repaid out of the land what he has paid on his own bond.

The lands of the defendants are subject to this mortgage, but only to their proper share of it. This parcel was separated from the whole by the conveyance of Minor to Joseph Stillman, November 25th, 1857; that was made expressly subject to this mortgage. The payment of it was not assumed by the grantee. This parcel must pay such proportion of

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the amount now due upon the mortgage, as its value bore to the value of the whole tract at the time of that conveyance. This proportion was fixed by that conveyance, and cannot be changed by any subsequent change in the relative value of the parcels.

ZANE vs. CAWLEY.

1. A mistake as to facts or the contents of a contract for the sale of land, might, in some cases, excuse or modify the performance, but the vendor must perform it according to its legal effect, unless he is misled by the fault of the other party.

2. When the matters constituting the complainant's equity are clearly and definitely denied in a responsive answer, they must be proved by the oath of more than one witness.

This cause was argued upon the pleadings and proofs.

Mr. J. N. Dickinson, for complainant.

Mr. M. P. Grey, for defendant.

THE CHANCELLOR.

This suit is to restrain the defendant from prosecuting a suit brought by him against the complainant, in the Salem Circuit Court, for cutting and carrying away the wheat growing on the defendant's farm, in July, 1867. The farm had been conveyed by the complainant to the defendant on the 20th of March, 1867, by deed, without any reservation of the wheat. The bill alleges that at the agreement for the sale, made on the 5th of January, 1867, it was agreed that this crop of wheat should be reserved to the complainant; that by mistake the reservation was not inserted in the written contract executed on that day, but that two days afterwards the reservation was endorsed on the con-

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tract by authority of the defendant; and that at the time of the delivery of the deed it was not inserted in the deed, because the scrivener told the complainant that the endorsement on the contract was sufficient, and that it was not necessary to insert it in the deed. The bill does not seek to rescind or reform the contract, or to have the deed delivered up on repayment of the purchase money, but only to restrain the action at law.

The equity of the complainant rests upon the allegation that there was an agreement at the sale that the wheat crop should be reserved to him. Without such express reservation, the agreement for the sale of the farm would, of course, oblige the vendor to convey it without reservation, or with the crop included. A mistake by the vendor as to the legal effect of the contract, in this respect, would not be a good defence to a suit for performance. He would be obliged to perform it according to its legal effect, unless he was misled by fault of the other party. A mistake as to facts, or the contents of the contract, might, in some cases, excuse or modify the performance. The complainant does not place himself on the ground that he mistook the legal effect of the contract, but that there was an express agreement to reserve the crop, which was not inserted in the contract. He must, in the first place, prove that there was such an agreement. It is alleged in the bill clearly and definitely; it is as clearly and definitely denied in the responsive answer. This, by the well settled principles of proof in this court, requires that the agreement should be proved by evidence greater than the oath of one witness. The only witness to the agreement is the complainant himself. There is nothing in the evidence anywhere to confirm this testimony. The general expression in the testimony of the scrivener, that he always understood that the wheat was reserved, does not support it, for he did not hear the verbal contract, and it is clear, from his whole evidence, that the question of this reservation was first brought to his attention two days after the contract was made; and the only admission made to him, at any

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time, by the defendant, was the answer, "I did not consider anything about it," to the question, "did you consider the wheat reserved?" This, clearly, only referred to his view of the legal effect of the contract, and it did not authorise the endorsement made on the contract in pencil by the scrivener, "wheat reserved by consent of parties." This was the only authority, and that endorsement was a nullity. Without regard to the effect of a responsive answer, the complainant would not have sustained his case. He swears that the contract entered into was different from the written contract; he has the burden of proof. The defendant contradicts him. To change a written contract, requires proof clearly preponderating.

The case stands, then, without sufficient proof that there was any contract that the wheat should be reserved to the complainant, and, of course, he can be entitled to no relief founded on that ground. He would have been compelled to convey the farm without that reservation, and the fact that he was misled by the assertion of the scrivener, that the endorsement on the contract was sufficient to reserve the wheat, could be of no avail. It was, at most, a mistake of law, into which he was led without any agency or silence of the defendant. The evidence does not show that the question was raised in the presence, or to the knowledge of the complainant, until after the delivery of the deed and the payment of the consideration. Then, for the first time, he was told that the scrivener had said the endorsement was sufficient to reserve the wheat.

The bill must be dismissed, and the defendant allowed to proceed at law.

Calkins v. Landis.

CALKINS vs. LANDIS.

The unsupported testimony of the complainant is not sufficient to overcome the responsive denial of the answer.

This cause was argued on the pleadings and proofs.

Mr. Richey, for complainant.

Mr. J. T. Nixon, for defendant.

THE CHANCELLOR.

The bill charges, that the defendant agreed to sell one hundred acres of land in Vineland to the complainant; that the complainant made some of the payments, and that defendant, by parol, gave him further time for the other payments; that the defendant has not conveyed the land to the complainant, but has sold it to others. The bill prays that he account for the amount received, and be compelled to pay the same to the complainant.

The defendant, in his answer, admits the sale, and denies that he extended the time for the payments not made. He states that he gave notice that the contract was forfeited for not complying with the conditions; that the complainant agreed to give up the contract, and that the payments made on it should be transferred and credited to other contracts, made by the defendant with the complainant, and that they were transferred to and credited on these contracts; and that deeds were given to and accepted by the complainant, the consideration of which was paid by the transfer of these payments.

The responsive denial of the extension of time is contradicted by the evidence of the complainant only; it is, therefore, not proved. The agreement to give up and surrender the contract to convey the one hundred acres, and to transfer the payments made on it to other contracts, and the

Merritt v. Brown.

transfer and the acceptance of deeds founded on such transfer, is proved by the evidence of the defendant and of J. L. Rink, and contradicted by the evidence of the complainant only. It is proved, to my satisfaction; and that agreement and surrender is a bar to the present suit.

The bill must be dismissed with costs.

MERRITT vs. BROWN.

When a shareholder sells shares, for which he has not paid the company, to a vendee, who assumes his liability to the company, and pays him \$2500 in cash, this sum is the clear profits on the transaction.

On exceptions to master's report.

Mr. Gilchrist, Attorney-General, for exceptant.

Mr. Williamson, for complainant, contra.

THE CHANCELLOR.

The order of the Court of Appeals directed Brown to account to Merritt for the proceeds of twenty-five shares of stock transferred to him. After the transfer, the company issued to Brown sixteen new shares of additional stock, for which Brown never paid, but became responsible to the company for the amount, being \$1600. He afterwards sold the forty-one shares to A. Baiz, the president of the company, for \$2500; Baiz, in addition to the \$2500, becoming responsible to the company for the price of the sixteen shares. Under this state of facts, the master has rightly concluded that Brown received the \$2500 for the twenty-five shares transferred to him by Merritt, and that the assumption of the price of the sixteen shares by Baiz was the price of those shares.

The exceptions must be overruled.

Starkey v. Starkey.

STARKEY vs. STARKEY.

1. **Where** a husband actually drives his wife from himself and his house, or, by **his** cruel and abusive treatment, compels her to leave it for her safety or comfort, it is an abandonment and separation by him, and would entitle her to support and maintenance, under the tenth section of the divorce act.

2. **But** where the wife leaves her husband and his home, and goes and continues to reside elsewhere, this is *prima facie* abandonment by her, and she must show clearly that her going away was compulsory.

This cause was argued upon bill, answer, and proofs.

Mr. J. M. Scovel, for complainant.

Mr. Carman, for defendant.

THE CHANCELLOR.

The bill is exhibited for support and maintenance, under the tenth section of the divorce act. It alleges that the complainant was married to the defendant in 1857, and lived with him until 1867; that he treated her at times with great harshness and extreme cruelty; that on the 6th of August, 1867, he cruelly beat her, drove her away from his house, her home, striking her on the head with his fist, saying, with an oath, "now I will kill you, and I want you to leave my house right away;" that she went away and continued to live away from him until November 17th, 1869, twenty days before the filing of this bill; when she sent a letter to him by a special messenger, offering to return and live with him, and desiring an answer within a week, or else that she would be compelled to commence a suit against him; and that to this letter he returned an insulting answer.

These facts, if proven, are sufficient to entitle her to the relief she asks. It is true, that the statute authorizes the relief only in cases where "a husband, without any justifiable cause, shall abandon his wife, or separate himself from her, and refuse or neglect to maintain and provide for her;"

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and in this case she left his house and separated herself from him. Yet, in all cases where a husband either actually drives his wife from himself and his house, or by his cruel and abusive treatment, compels her to leave it for safety or comfort, it is an abandonment and separation by him. But when the wife leaves her husband, and his home, and goes and continues to reside elsewhere, this is *prima facie* an abandonment on her part, and the burden of proof is upon her to show that her going away was not voluntary, but that she was compelled to go by his treatment or command.

In this case the question depends upon what was done on the 6th of August, the day upon which she left his house. There is proof, on her part, of some acts of cruelty at different times before this, but they are positively denied by him, and if the case depend upon them they are not sufficiently proved to found a decree upon: the evidence is conflicting, that against them is almost, if not quite, as strong as the evidence of the complainant. But it is clear that these prior acts did not cause the separation, and therefore cannot justify it: they had been forgiven and condoned.

The violence and threats, and command to go away on the 6th of August, 1867, are proved by the oath of the complainant alone. They are denied by the defendant in his testimony, and also by his daughter, who was present at the time. Their story of what then took place differs entirely from that told by the complainant in her bill, and in her testimony.

The clear weight of testimony is against the complainant on this point, where the burden of proof is upon her. Nor is she more successful in proof of his refusal to permit her to return, when she offered to do so in writing. In the first place, it seems to me that the offer was not made in good faith for the purpose of being received by him, but made under the advice of counsel, as a foundation for this suit. She had left his house and stayed away for two years, without any offer to return, or negotiations for reconciliation. The defendant had broken up housekeeping, and was living with

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his son. Under these circumstances, a letter sent by a mere messenger, offering to return, and requiring an answer in a week, under pain of a law suit, is more a declaration of war than an attempt at reconciliation, or restoration to her place in his family. If she left him without sufficient cause, as I must conclude from the evidence in this cause, such a letter, even if not answered, would not place him in the position of having abandoned his wife or separated himself from her. But she not only fails to show that he returned an insulting answer, as alleged in her bill, but it is positively proved by him, and by more than one witness besides himself, that he told her messenger to tell her she might come if she saw fit to come, where he then was boarding with his son. He offered her the only home and place which he had for her. That he had no other was evidently caused by the fact that she had left him. His circumstances were such that he could not, within a week, if at all, procure a new, separate home where she might live with him. And the difficulties and quarrels of their past life, unquestionably in some degree owing to her violence and temper, were such that it might not be wise, on a note so short and defiant, to incur the expense of providing a home, in expectation or hope that she would remain in it.

I am forced to conclude that this is not a case of abandonment, such as to entitle the complainant to relief under the tenth section of the divorce act.

The bill must be dismissed.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY.

OCTOBER TERM, 1870.

FIDLER *vs.* HIGGINS and others.

1. The surplus of the proceeds of lands of an infant sold by order of the Orphans Court to pay debts of her father, from whom she inherited them, remains real estate, and at her death must descend as such.

2. The descent of real estate in New Jersey is governed by the rules of the common law, so far as these rules have not been changed by statute.

3. The common law rule, that among collateral relatives, lineal descendants shall represent their ancestor *ad infinitum*, has not been altered, either expressly or by implication, by the statutes of New Jersey regulating descents.

4. The degrees of consanguinity mentioned in the sixth section of the statute of descents, must be ascertained by the common law rule as to descent of real estate, allowing representation among collaterals, which, like the rule prohibiting ascents, has never been changed. The rule of the Civil law for computing next of kin, has never been adopted in this state, and it is not required by any implication from the provision of this section. And the "equal parts" in this section must be held to mean equal *per stirpes*, as the like words, "equal portions," in the statute of distributions are settled to mean.

5. By such representation, cousins and more remote descendants of deceased uncles of an intestate are in the same degree as living uncles, and inherit, by representation, the share of such deceased uncle.

Fidler v. Higgins.

The complainant was guardian of Mary Anna Higgins, who died under age, January 23d, 1867. He, as her guardian, in her lifetime, had received a sum of money, which was the surplus of the proceeds of lands that had descended to her from her father, and been sold by an order of the Orphans Court of Hunterdon, for the payment of his debts. Part of these proceeds remain in the complainant's hands, the amount being adjudged by the Orphans Court on a settlement of his final account as guardian, after the death of his ward. The infant was never married; she left, at her death, no brother or sister of the whole or half blood, or issue of such brother or sister, but left her mother, Elizabeth Fidler, William B. Higgins, a brother, and Catharine Gano, a sister of her father, and Lemuel M. Deats and Julia Deats, children of Rebecca Deats, a sister of her father, who had died in her lifetime, and left no other collateral relations on part of her father, of the same degree of consanguinity.

The surviving aunt and uncle of the infant, Mary Anna, claim that they are exclusively entitled to the amount which may remain in the hands of the guardian after the death of Elizabeth Fidler, as the heirs-at-law of Mary Anna; and Lemuel and Julia Deats claim that, as representatives of their mother, they are entitled to her share, or one-third of the amount, as co-heirs.

The bill is filed to settle this question, and the parties are all before the court. The defendant, William B. Higgins, having died after the commencement of this suit, his executor, George Higgins, has been made a party in his place.

The cause was argued upon exceptions filed by George Higgins to the master's report.

Mr. J. N. Voorhees, for exceptant.

Mary Anna Higgins died January 23d, 1867. The complainant was her guardian; and on the statement and settlement of his final account with the Orphans Court of Hunterdon county, there remained in his hands \$1156.15,

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to be disposed of according to law. This money was proceeds of sale of real estate of John Higgins, deceased, the father of Mary Anna, and descends as real estate. Mary Anna died without leaving lawful issue, brother or sister, or any lawful issue of any brother or sister, without leaving a father, but leaving a mother; consequently, under the fourth section of the statute regulating descents of real estate, *Nix. Dig.* (4th ed.) 236, the inheritance goes to the mother for life, and at her decease, then as directed by the sixth section of the same statute, which provides—"When any person shall die seized, &c., without, &c., and shall leave several persons, all of equal degree of consanguinity to the person so seized, the lands, &c., shall then descend and go to the said several persons of *equal degree of consanguinity* to the person so seized, as tenants in common, in equal parts, however remote, &c."

Mary Anna left her surviving William B. Higgins, (uncle), Catharine, wife of George Gano, (aunt), Lemuel M. Deats and Julia R. Deats, children of Rebecca, wife of Hiram Deats; Rebecca being an aunt to Mary Anna; Lemuel M. and Julia R. being cousins to Mary Anna.

The question, therefore, presented, is, do surviving uncles and aunts take, as a class, before, and in exclusion of surviving cousins?

In calculating the degrees of consanguinity by force of the sixth section, the rule of the Civil and not that of the common law, is to be used. *Taylor v. Bray*, 3 Vroom 182. This seems to have been a well considered case, and the Chief Justice, in pronouncing the opinion of the court, has reviewed the statutes relating to this subject, from 1780 to 1867, and on page 185, says, in reference to the sixth section of the act regulating descents: "And by a similar train of reasoning, we reach the further conclusion that the section in question not only bestows the estate on the class of relatives next to the person dying seized, but also gives it to a unit of such class, that is to say, for example, if a single uncle or aunt survives, he or she will inherit, rather than

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cousins, the children of deceased uncles or aunts." And, in fact, the whole reasoning of that case seems to concede the point that in computing degrees of relationship we adopt the Civil law rule. This will appear from the concluding remarks of the opinion, page 191. He says: "I am aware that formerly there was some uncertainty on this subject, but the opinion of the profession appears to have become settled in favor of the method just indicated. Such method has received the approval of Chief Justice Green. *Nix. Dig.* 215. The opposite doctrine is attended with consequences which appear to forbid, imperatively, its adoption."

By the common law method of computation, the children of deceased uncles and aunts (being by force of this rule as near of kin as living aunts and uncles,) would be entitled to share the estate equally, *per capita*. Hence, in this case, if Rebecca were living, she would be entitled to one-third, but being dead, and leaving two children, it would follow, that as the statute directs that the estate must go to the said persons of equal degree of consanguinity, &c., *as tenants in common in equal parts*, the children of Rebecca must each have one-fourth, making for their share one-half of the whole estate, while if their mother had been living at decease of Mary Anna, she could only have received the one-third. Can this be the rule? By the statute they take as tenants in common in *equal parts*, and in this case, if Rebecca had twelve children, they would have taken twelve-fourteenths of the whole estate, because the law says they take "*as tenants in common in equal parts*." *There is no provision for them to have their mother's share*. If they take, it is because they are of equal degree of consanguinity with William B. Higgins, and Catharine, wife of George Gano; and if that be so, then the estate must be divided in as many parts as there are persons of equal degree of consanguinity to the person dying seized, and each person so related takes an equal share. Sections two and five, and other sections of the same act, provide for such a contingency, (the child taking parent's share). And had the legis-

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lature intended that cousins should take, when uncles and aunts were living, would there not have been some provision by which such cousins should have only taken their parent's share?

The master's report in this case seems to be founded upon the suggestion of the court, in the case of *Oberly v. Lerch*, 3 C. E. Green 346, affirmed by the Court of Appeals, 3 C. E. Green 575.

The question argued, and the only question argued in that case, referred to the status of surplus moneys arising from sale of lands by order of court to pay debts, whether such surplus moneys descended as realty or personalty; and no point was raised as to the right of Emma Baker (cousin) to a share of such moneys. On the cause being decided by the Court of Appeals, the same point, previously stated, and no other, was discussed. And the Chief Justice, who pronounced the opinion, adverts to the fact, that the contest is between the heirs-at-law on the one side, and the personal representatives of deceased. And again he says, page 581, in my opinion this point, (referring to surplus money, whether personalty or realty,) which is the only substantial one in the case, should be considered *res adjudicata*. Again: "these were the only points raised on the argument." No reference is made by him to his opinion previously given in *Taylor v. Bray*, and the status of Emma Baker, the cousin, does not seem to have been referred to and argued, but, by consent, she seems to have been considered an heir-at-law.

The question as to the right of Emma Baker in this case, not having been raised, and consequently not considered as a subject matter in controversy, it would seem that this case ought not to be considered as settling the law in regard to the rights of aunts or uncles, and cousins. The ambiguity or uncertainty as to the proper construction of the sixth section, having been expressly settled in the case of *Taylor v. Bray*, and settled, as the Chief Justice expresses it, in conformity with a former opinion of Chief Justice Green, and in conformity with the recognized sentiment of the pro-

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fession, and also in favor of the doctrine which recognizes the natural right inherent in propinquity in blood, it should not now be disturbed. We therefore respectfully submit, that the children of Hiram Deats, should not receive any portion of the moneys in complainant's hands, but that the same should go to William B. Higgins and Catharine Gano.

Mr. Bullock, contra.

It is insisted, on behalf of William B. Higgins and Catharine Gano, that under the sixth section of the act directing the descent of real estates, uncles and aunts take, as a class, before and in exclusion of surviving cousins.

But they rely exclusively, and, as it seems to us, must rely exclusively, upon the *obiter dictum* of the Chief Justice, in the case of *Taylor v. Bray*, 3 *Vroom* 182, where the question, and the only question presented was, whether by force of the said sixth section of the statute of descents, a grandmother could take land of which her grandson died seized; in other words, whether the first rule of the common law, regulating the descent of lands, that the inheritance should never lineally ascend, had been abrogated in this state. The court held in that case, very decidedly, that that rule of the common law had not been repealed, but says that some other rules of the common law regulating the descent of lands, equally important, have been abrogated.

We think the case of *Oberly v. Lerch*, 3 *C. E. Green* 346, affirmed by the Court of Appeals, *Ibid.* 575, is on all fours with this case in every respect.

The estate of Emma Oberly consisted of the surplus proceeds of the sale of her father's lands, sold by order of the Orphans Court for the payment of his debts. Precisely the same as that of Mary Anna Higgins.

Emma Oberly died an infant, leaving Charles Oberly, John F. Oberly, and Robert Oberly, her paternal uncles, and Emma Baker, the daughter of her deceased paternal aunt, her only heirs-at-law, besides her mother, who inherited for life. Mary Anna Higgins died an infant, leaving William

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B. Higgins, her paternal uncle, Catherine Gano, her paternal aunt, and Lemuel M. Deats and Julia R. Deats, children of her deceased paternal aunt, her only heirs-at-law, besides her mother, who inherits for her life.

We insist, that as in that case, so in this, the estate in the hands of the guardian of Mary Anna Higgins, should be invested for the use of her mother during life, and at her death, the principal be divided among the uncle, aunt, and cousins aforesaid.

The sixth section of the act directing the descent of real estates, by construction of which it is attempted to exclude Lemuel M. and Julia R. Deats, provides, that where any person shall die seized, &c., without leaving, &c., capable of inheriting by this act, &c., and shall leave several persons, all of equal degree of consanguinity to the person so seized, the said lands, &c., shall then descend and go to the said several persons of equal degree of consanguinity to the person so seized, as tenants in common in equal parts, however remote from the person so seized the common degree of consanguinity may be, unless where such inheritance came to the said person so seized, &c. *Nix. Dig. (4th ed.)* 236.

There can be no question but what Lemuel M. and Julia R. Deats are entitled to share this estate with their uncle and aunt, if the degrees of consanguinity are reckoned by the rule of the common law.

The Constitution of this state, adopted July 2d, 1776, section 22d, provided that the common law of England should still remain in force until altered by a *future law of the legislature*, unless repugnant, &c.

The present Constitution of this state, article X, section 1, provides, that the common law now in force, not repugnant to this Constitution, shall remain in force until altered or repealed *by the legislature*.

In the case of *Den v. Jones and Searing*, 3 *Halst.*, p. 345, Chief Justice Ewing says: "Nothing but the plain and imperious requisition of a *statute* ought to induce a de-

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arture from the well known and safe rules of the common law."

We submit, that in ascertaining the collateral heir of the person last seized, the rule of the common law prevails in this state, having never been altered or repealed by statute. And we respectfully insist that in this case, the degrees of consanguinity are to be reckoned by the rule of the common law, and that Lemuel M. Deats, and Julia R. Deats, are entitled to share the estate with their uncle and aunt.

THE CHANCELLOR.

The money in the hands of the complainant, as guardian, being the surplus of the proceeds of lands of an infant, sold by order of the Orphans Court to pay debts of her father, from whom she inherited them, remains real estate, and at her death must descend as such. This was settled by the Court of Appeals in their affirmance of the decree of this court, in *Lerch v. Oberly*, 3 *C. E. Green* 575. It is admitted by all parties that the mother is entitled to the interest of this money for her life. The only question is, whether, by the statute of descents in New Jersey, cousins, the children of a deceased uncle or aunt, are entitled to inherit with uncles and aunts who survive the intestate, or whether such uncles and aunts are entitled to inherit exclusive of cousins, as not in equal degree of consanguinity, and not entitled to represent their deceased parent.

The question is one which has never been directly decided by the law courts of this state. There are dicta and supposed impressions of the bar of the state, against the right of cousins to inherit with uncles and aunts, and on the other hand, in the case of *Lerch v. Oberly*, it was expressly ruled in this court, that a cousin of Emma Oberly, the daughter of an aunt who had died before her, inherited equally with her surviving uncles; the decree was framed upon that ruling, and was afterwards affirmed in the Court of Appeals. The opinion in this court was not given inadvertently, but was one that had been formed upon a careful consideration

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In the case of *Taylor v. Bray*, above mentioned, the present Chief Justice, in some observations at the conclusion of his opinion, 3 *Vroom* 191, assumes that the degrees of consanguinity under our statute, should be reckoned by the rule of the Civil, and not of the common law. He states that formerly there was some uncertainty on this subject, but that the opinion of the profession *appears* to have become settled in favor of the Civil law method. This question was not involved in that case, and this view is no part of the decision of the case, and does not seem to have been considered by the court. The dicta of so able and learned a jurist are entitled to great regard, but they do not amount to a definite decision by that court, which, on a legal question, would control me sitting here. The question is by him regarded more as put at rest by the opinions of the bar, than by any definite application of rules of construction; and much reliance is placed upon the unreasonable consequences which are assumed to follow the other construction, consequences entitled to great consideration, if they were not obviated by the construction universally put upon like terms as to equal shares, when given to representatives by the statute of distributions. The question was not argued in that cause, and I can conceive that the argument, and consideration of the question, might change the views of the Chief Justice expressed in that opinion. And with the views I have formed and expressed on the question, I cannot regard this as such a settlement by a court of law as to control this court against its own views.

The common law of England, which is adopted in this state, especially as regards real estate, has certain clear and well settled rules or canons of descent, which, so far as not changed by statute, our courts have always recognized and adhered to. These canons have never been held to be repealed by doubtful words, but only by express words or necessary implication. Among these rules or canons is one, that inheritance shall lineally descend, but shall never ascend. A statute would repeal this rule, and where it

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directed in certain cases that a father or mother of the decedent should inherit his lands, the rule was so far repealed. But when the statute directed that in certain cases the lands should go to persons in equal degree of consanguinity to the intestate, although a grandmother is, by any rule of reckoning, kindred in the second degree, and is included in the terms of the statute, yet it was held that this rule of the common law was not repealed by such an implication as this, but that as this provision could in many cases have effect without repealing that rule, it must be intended to have been made subject to that rule, and not in derogation of it. Such is undoubtedly the correct rule of interpretation where the statute does not in any other part indicate design to change the established rule. This is most clearly and logically shown in the opinion of the Supreme Court in the case of *Taylor v. Bray*, above referred to.

Another common law rule, or canon of descent, the fifth enumerated by Blackstone, is, that on failure of lineal issue the inheritance shall descend to the collateral relations of the blood of the first purchaser, subject to the rules that the lineal descendants shall represent their ancestor *ad infinitum*, and that the collateral heir shall be the next collateral kinsman. The canons of male preference and primogeniture, which also qualified this rule, have been expressly repealed. Now, by this canon it was never doubted or disputed that the common law recognized representation among collaterals *ad infinitum*. And when an intestate left only female collateral heirs, as one aunt, three daughters of a deceased aunt, and one daughter, and five granddaughters by the same deceased mother, of a third deceased aunt, that all these would inherit together; each set of children taking, by representation, the share of its deceased parent.

The question here is, has this rule been changed by the legislation in New Jersey? There is no express enactment changing or limiting the rule of representation among collaterals. In the statute of distributions, it is expressly enacted that no representation shall be admitted among

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collaterals, after brothers' and sisters' children. There was, perhaps, no necessity for it there, as by the practice of the ecclesiastical courts, and by the Civil law, which those courts had adopted, there was no representation admitted, but by brothers' and sisters' children, among collaterals. But for greater precaution, either because the words next of kindred might include all representatives, as these were provided for in case of lineal kindred, or because the well established rule of representation *ad infinitum* among collaterals as to inheritance, might be held to attach, representation was expressly limited in that act. And the omission of this limitation in the part of the subsequent statute of descents, which relates to the same subject, would indicate that it was not intended to adopt it there.

Nor is there anything in the act of descents, or in the past legislation of the state on that subject, which shows an intention to abolish the common law doctrine of representation among collaterals. On the contrary, every act in the whole legislation of the state, has shown an intention, carefully and minutely declared, to provide for representation among collaterals, as well as lineal descendants, wherever they are mentioned. In case of brothers and sisters of the whole blood or half blood, it provides that in case they, or any of their children, shall have died, their children, respectively, shall take their share; a provision which the courts will continue, by construction, to the most remote issue. For, by the statute, neither father nor mother, nor collateral of equal degree, can take, as long as there is *any issue* of a brother or sister of either whole or half blood. And the doctrine of primogeniture would not be revived to fill the hiatus.

The fact that none of the acts regulating descents, or to reform the provisions of the common laws, contain any provision like that of the statute of distributions, that no representation should take place after brothers' and sisters' children, shows that there was no intention to abolish representation. The provision in the statute of distributions, so familiar to

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any lawyer who took part in drafting the acts relating descent, would have suggested it, if such was the intention. The Civil law, with regard to succession, is founded on the 118th Novel of Justinian, as amended by the 126th Novel. In Novel 118, we find the provision limiting representation to brothers' and sisters' children, in nearly the same words as used in the statute of distributions. It was introduced there to limit the doctrine of representation, which was adopted in other parts of the same Novel, and had been the rule of the old Roman laws, as contained in the Digest, as was the rule of the common law. And although the statute of distributions is not copied from the 118th Novel, but in many, if not most, of its provisions is radically different, yet there was the same reason for introducing the limitation in the statute as there was in the Novel—that is, that the common law, like the Roman law, always recognized representation. These facts make the omission in the statute of descents significant.

Representation among all of the blood of the ancestor, has been a favorable doctrine among the legislators and the people of this state. The legislature have shown this, not only by their positive provisions, but by using, in this section, the word consanguinity instead of kindred, as in the statute of distributions. This word refers to the bond of *blood*, by which the common law transmits property, *common* blood coming from the same ancestor; a word peculiarly appropriate to the common law mode of reckoning kindred, as distinguished from the canon or Civil law rules. By the doctrine of representation, the common law rule is always to count the degrees from the intestate to the common ancestor. Those who come from the nearest ancestor of the decedent, are united by the nearest common blood or consanguinity, as concerns or relates to him. And that one uncle of the deceased should take the whole inheritance, to the exclusion of the children of two other uncles who had died shortly before him, would strike as grossly unjust every citizen who had been trained to venerate the justice of

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the system of the state in dividing property equally among all of the blood of the ancestor; and this would be the impression, even if the inheritance was not derived from a common ancestor.

The words "of equal degree" of consanguinity, cannot be held to exclude cousins from inheriting with uncles, as long as the common law rule of reckoning degrees is adhered to; *that* includes representation; and by that, cousins are in the same degree with uncles. The common law had this settled rule; and it was the rule adopted as to real estate and adhered to in England and in this country, long after the statute of distributions and the decisions adopting the Civil law computation under it. With this rule established as the common law rule for reckoning degrees in the subject of legislation, the legislature pass an act to regulate the descent of real estate, and mention, without further definition, degrees of consanguinity. It is impossible, by any rule of interpretation, to infer that any other meaning was intended to be given to these words, than the technical meaning given to them in the system of law, as to the particular subject in which they are used, and to which they relate. The word heirs, if used in a New Jersey statute, would mean heirs by its present laws, not heirs by the law of England or the Civil law, or any system of foreign law.

And the doctrine of the Supreme Court in the case of *Taylor v. Bray*, as to ascent, applied to this case, would clearly leave the common law rule to govern it. That case was much stronger than this; the grandmother was clearly of consanguinity to the decedent, and nearer than his collateral relations. She was the person designated by the words of the statute, and by them was entitled, by whatever rule consanguinity was reckoned, and without regard to the doctrine of representation; and yet it was held that although these words, in their literal meaning, would contravene the common law rule against ascent, yet, as there was no trace in the legislation of the state of any purpose to abolish the ancient law, these words should not have that effect.

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From the history of the legislation of the state, it is obvious that the sixth section of the statute of descents, on which this question arises, was introduced only for the purpose of abolishing male preference and primogeniture among collaterals, as they had before been abolished among lineal descendants, and descendants of brothers and sisters.

The first act in the legislation of the state on this subject after the Declaration of Independence, was that of May 24th, 1780. *Pamph. Laws* 81; *Pat. Laws* 43. This abolished entirely the right of primogeniture, and partially the preference of male stocks, by giving to male descendants, both lineal and collateral, as far as brothers and sisters and their issues, two shares to one for a female descendant. It also provided for inheritance by brothers and sisters of the half blood, without excepting those not of the blood of the ancestor. This act provides for lineal descendants in the first section, for brothers and sisters in the second section, and for brothers and sisters of the half blood in the third section. It carefully provides for representation among lineal descendants and issue of brothers and sisters of the whole blood in the first two sections; but does not provide this as to the half blood in the third section, which was evidently drawn by a less skillful hand; and by a blunder, not strange, perhaps, if we knew its draftsman, but which, it seems strange, could have been overlooked by those who had charge of this change of legislation, provides if a person should die seized intestate, and without leaving a brother or sister of the whole blood, or their issue, leaving a brother or sister of the half blood, that such half blood should inherit; and as it does not mention dying without issue, the half blood would, by the literal interpretation, take in preference to children, if there was no brother of the whole blood. This act does not provide for any collaterals beyond brothers of the half blood, and the issue of brothers of the whole blood, but left the common law rules, as to primogeniture and preference of male stocks, in full force as to uncles, cousins,

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and all more distant collaterals, and left nephews of the half blood under the ban of the common law.

The next step taken was by the act of February 5th, 1816, (*Pamph. Laws* 7,) which was intended to abolish the rules of primogeniture and male preference entirely, and to give male and female heirs equal shares, whatever the common degree of lineal or collateral relationship might be. It provided this by general words. It enacted that the real estate of any person who should "die intestate leaving *two or more heirs* lawfully entitled to the same, should descend to, and be inherited by, his or her said heirs, whether male or female, lineal or collateral, in equal shares or portions." This act left the law as it was, so far as it declared who were heirs, but enacted that all who were heirs by the law as it then was, should inherit in equal shares, whether male or female.

Next follows the act of February 15th, 1816, (*Pamph. Laws* 26,) amending the third section of the act of 1780, relating to half blood, by inserting the words "lawful issue or" between the words "without" and "any brother," &c., and by adding a clause excluding those not of the blood of the ancestor, from whom the property came to the intestate; but it did not provide for representation. Before this, the Supreme Court, in *Den v. Urison*, 1 *Penn.* 212, and *Den v. De Hart*, 2 *Penn.* 481, had held that the provision for brothers of the half blood, must be taken as subject to the general rule of the common law in other collateral descents where the intestate had inherited the land from an ancestor, that he must be of the blood of the ancestor. But the Court of Appeals, in *Arnold v. Den d Phoenix*, 2 *South.* 865, overruled these cases, evidently to arrive at an equitable result, according to their spirit, but against the letter, and the decision so made was followed in *Den v. McKnight*, 6 *Halst.* 385.

Next follows the act of January 29th, 1817, (*Pamph. Laws* 8, *Rev. Laws* 608,) of which the seven enacting sections are the same in effect, and almost in words, as the first seven

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sections of the act of 1846, now in force, except that in the last is added a provision that in a certain case a mother may inherit for life. It is to be remarked that while the act of 1780 provides for representation of children and brothers and sisters dying in the lifetime of the ancestor, by the word "issue," so as to include all their descendants to the remotest degree, the acts of 1817 and 1846 change the language, and provide that if a brother or sister should have died leaving a child or children, such child or children should inherit the share of his father or mother, and the same law of inheritance should be observed in case of the death of any child of a brother or sister, before the person dying seized. There is no direct provision for representation further than children of nephews. That depends upon the implication to be derived from the language of the sixth section, which only provides for collaterals of equal degree of consanguinity, upon failure of "issue" of brothers and sisters. The first section of the act of 1780, relating to lineal representation, is also changed in language in the acts of 1817 and 1846, but so as to include all lineal descendants to the remotest degree. These acts also provide for representation by children and grandchildren of brothers and sisters of the half blood, in the same manner as of those of the whole blood, and change the previous act in that respect. Here we see a careful provision in all legislation, both as to lineal and collateral heirs, for representation according to the canons of the common law, extending even to the half blood, when of the blood of the ancestor, and when omitted by inadvertence, provided for in the subsequent legislation.

In the sixth section of the act of 1817, the descent of collaterals beyond the issue of brothers and sisters, is provided for. It was intended to supply the provision of the act of February 5th, 1816, thereby repealed, and to correct the evident defects in the language of that act. The object in both cases, was simply to abolish primogeniture and male preference in all cases, as had been done before, among lineal descendants, and brothers and sisters, and their issue.

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except that males had two shares. The language of the act of 1816, clearly, simply, and fully effects the purpose; it showed no design, and could not be interpreted to change or limit the common law doctrine of representation; its defect was, that it provided only for such persons as were then, by law, the "lawful heirs" of the intestate. A female cousin was not then a lawful heir, if she had a brother living; the act was no doubt intended to include that very case, and would now be construed to include it in a case of descent while it was in force. Yet it was better to change the language so as to include it expressly, and not by construction only. The section does not provide that the several persons in equal degree, shall be those in the nearest degree. That was provided for by the common law rule, which it did not intend to interfere with, but only to provide that when there were several in that nearest degree, according to the common law rule, they should inherit equally.

The general intent of all the legislation was to preserve the doctrine of representation among collaterals as well as lineals, and in no case is there any positive attempt to change or abrogate it.

The doctrine of the common law as to representation among collaterals must therefore be held, like the rule as to ascent, not to be affected by the provisions of this sixth section.

The consequences supposed to flow by the words of this act, it is said, must prevent permitting such representation. It is assumed that if cousins are held to be in the same degree as uncles, six children of a deceased uncle would inherit with a surviving uncle *per capita*, each one-seventh. But this difficulty should not change the construction of the language, settled by other cases in precisely the same situation, and according to the established rules of construction. It should be avoided by giving to the provision itself that meaning which was evidently intended. The words "shall descend and go to the said persons of equal degree of consanguinity, as tenants in common in equal parts," should be

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construed by holding that the words "in equal parts" refer to a division *per stirpes*, and not *per capita*; a division in the manner in which the common law would divide it among female heirs or others taking in equal shares. The words of the section, if taken literally, and without regard to the evident object of the legislation, would warrant a division *per capita*. But these or like words in legislation on kindred subjects, have always received the interpretation contended for. The statute of distributions, 22d and 23d Car. 2, ch. 10, directs the distribution of "the residue by *equal portions* to, and amongst the children of, such persons dying intestate, and such persons as legally represent such children, in case any of said children be then dead;" "and in case there be no children, the residue to be distributed equally to every one of the next of kindred of the intestate, who are in equal degree, and those who represent them;" provided there be no representation among collaterals, after brothers and sisters children. This has been re-enacted in this state with the same words, and still continues to be the law of this state. If literally construed, a distribution by "equal portions," or "equally" to children or to next of kin, and those who represent any such as should have died, must be *per capita*, and the six grandchildren of a deceased daughter would each take an equal share with a surviving son, and the children of a deceased brother would take equally with the surviving brothers and sisters. Such construction has never been given to these acts, but the equal portions and equal divisions, have been held to be equally *per stirpes*, and not *per capita*.

All the acts regarding descent, have been and must be by common consent, construed according to their evident intention, and not according to the literal import of the words. The act of 1817, as now in force, according to its literal interpretation, does not abolish primogeniture or male preference, where an only child has died before his father, leaving children. The oldest son, on the death of the grandfather intestate, would take the whole. The act only provides for

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the case of an ancestor leaving two or more children. If he leaves one child, it would take by the common law. Then it provides that if any child shall have died, the share which such child would have been entitled to "under this act," shall descend to his issue equally. The provision of the act of 1780, was substantially the same. Yet no one would contend that in such case the oldest son of such only child inherited the whole, to the exclusion of his brothers; such doctrine would overturn titles as accepted for ninety years past. The manifest intent of the legislation must control the construction. So evident was this, that these words have been continued in the revisions of 1799, 1820, and 1846, although Mr. Griffith, in his Register, Vol. 4, p. 1250, called attention to them. The revisors, whose duty it was to correct defects of expression, did not think it required any alteration.

Again: the third section of the act of 1780, which directs in terms, that brothers and sisters of the half blood shall inherit before children of lineal descendants of the person dying seized, never was or can be construed according to this literal meaning, but according to the intent only, to provide for cases where there were no lineal descendants, or brothers of the whole blood. And this interpretation could be only on the ground that the rule of preferring lineal descendants is so engrafted on our laws, and deeply rooted in the opinion of our people, that the intention to change it will not be inferred until legislation has so expressly declared. Representation among collaterals is just as much cherished in our legislation, and the right of cousins to inherit with uncles is just as much impressed upon the minds of the community as a matter of equity and justice, as the preference of descendants to the half blood. In most cases the injustice would not seem so glaring, but if an orphan minor should die at twenty in the family of an aunt, where she had been brought up, and the children of that aunt, who had been as brothers and sisters, should be excluded from all share of her patrimony, because their mother had

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died a few months before her, and the whole should go to an uncle comparatively a stranger, the injustice of the rule would strike the public in such manner as would produce legislative changes of this construction of the law.

The act of February 5th, 1816, by its literal construction, would give the estate to all lawful heirs in equal shares. At that time, the children of a deceased son, and also of such deceased son's deceased grandchild were heirs, yet these would never have been held to take equally with a son *per capita*, but only *per stirpes*; the equality intended, if not expressed.

Such being the rule by which the term "in equal parts," in this section, must be construed, the difficulty assumed to arise from the consequences vanishes. And a construction by which the section is held to direct the descent to those in equal degree of consanguinity, according to the rules of the common law, including the doctrine of representation in equal parts, equal *per stirpes*, in case of representation, would be in harmony with the rules of construction in other cases, and give effect to the undisputed intent of the legislature.

If the Civil law rule for reckoning collateral degrees has been adopted as the law of this state, for computing degrees of consanguinity under the sixth section of the act of descents, that would put the question at rest, and render useless the reasoning to show that it is not the *proper* rule.

It has not been adopted by legislation, nor by any decision of our courts. It is said that the general opinion of the profession is in favor of it. The fact may be so; but many of the profession with whom for years I have conferred on this subject, have viewed it as unsettled, and some of no mean eminence have contended that it was not the correct rule. The report of the master in this case, a lawyer of eminence, of long experience and extended practice, to whom the office of Chief Justice was tendered near twenty years ago, shows that the profession are not unanimous in their opinion. Opinions formed, or rather acqui-

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esced in, from the fact that the rule of the Civil law had been applied to the statute of distributions, should not have much weight. And the opinion of the profession, and of legislators evinced by the statutes, and that of the public, has been held not to change the common law. Until the first decision in *Gough v. Bell*, it was the general impression of the bar, of conveyancers, of legislators, and I had almost said of the bench, that the owner of lands along the shore had title to low water mark. Yet this was held not to affect the rule of law, and it was decided that the state owned the soil to high water line, subject to certain rights and easements of the land owner.

The only authority I find for this position is a quasi dictum of Chancellor Kent, who says, 4 *Com.* 412, that in computing the degrees of consanguinity, the Civil law is *generally followed* in this country. He merely states the fact, but refers to no cases or authorities in which it has been so decided or held; I am unable to find a single case in which it has been so held, where the statute of the state has not adopted that rule, or one like it. The case nearest to it is one in the Supreme Court of Connecticut, *Hillhouse v. Chester*, 3 *Day* 166. The statute of Connecticut under which that case arose, gave "the residue both of the real and personal estate, equally, to every the next of kin of the intestate in equal degree, and those who legally represent them." Previous statutes and recitals in their preambles, showed that in Connecticut, real estate had generally been administered and divided among the heirs, in common with the chattels or movable estate, and that the lands of a woman, upon marriage, passed to her husband, and were disposed of by him, like her personal estate. And in the legislation of the state, land had been treated as of small value as compared with personal estate. On these considerations, and because the words "next of kin" were used, as applied to personal property, together with land, and were taken from the English statute of distributions, under which they had received a settled meaning, the court held the same meaning

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must be given to those words as in the statute of distributions, and applied to lands in the same sense as to chattels with which they were connected in the same sentence. In the New Jersey statute of descents, the words of the statute of distributions are not used, and the other reasons on which that decision is based, do not exist in this state.

The Civil law rule of reckoning degrees of kindred, has been adopted both by the English courts and in this state in giving effect to the statute of distributions. This was held by Sir Jos. Jekyll, Master of the Rolls in 1722, *Mentley v. Petty*, *Finch's Prec.* 593; by Lord Hardwicke, 1749, in *Thomas v. Ketteriche*, 1 Ves. 333; and by Sir John Strange, in 1750, in *Lloyd v. Tench*, 2 Ves. 213; and has been ever since acquiesced in. In the construction of the statute, the courts have always regarded the fact that it was for the purpose of regulating a matter which was the proper subject of the jurisdiction of the ecclesiastical court, which proceeded in matters of property according to the rules of the Civil law. That statute as stated by Holt, J., in *Pett v. Pett*, 1 Lord Raym. 571, and 1 P. W. was drawn up by Sir Walter Walker, an eminent civil lawyer. He had applied without success to the common law courts to compel the ecclesiastical courts to make distributions. These last mentioned courts originally held that the ordinary being entitled to the administration, could retain the surplus. But after the Reformation, it was the practice of the ordinary in granting administration, to require of the administrator, either a bond that he would distribute the surplus in the manner the ordinary directed, or that he should pay in advance certain portions to such persons. But after the statute of Edward III, directed that the ordinary should grant administration to the best friend of the intestate, he could exact no such conditions, and it was held that neither the ecclesiastical or civil courts could compel distribution. This was the occasion of the statute. Hence, in construing it, the courts regarded the rules of the Civil law, and of the ecclesiastical courts, as the proper rule for the construction

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of it. And Chief Justice North, in his learned and elaborate opinion in 1681, in *Carter v. Cawley*, published in *Sir T. Raym. R.* 496, refers to the rules of the Civil law as acknowledged in the ecclesiastical courts for the construction of that act, and states that he had consulted Sir Leoline Jenkins, Judge of the Prerogative Court, and Sir Robert Wiseman, Dean of the Arches, as to the rule in those courts; and adds at the end of his opinion a certificate on the same subject, procured from five learned doctors of the Civil law. This opinion of Chief Justice North, was on the question whether the representation allowed in the act to brothers' and sisters' children, must be confined to the children of brothers and sisters of the intestate, or should extend to those of the brothers and sisters of any surviving next of kin; and although not concurred in by the court at that time, there being no decision, was afterwards in a series of cases adopted as the rule of construction. Lord Commissioner Hutchins in *Beeton v. Darkin*, 2 *Vern.* 168, doubted; and Holt, C. J., in *Blackborough v. Davis*, 1 *P. W.* 41, was much inclined to adopt the rules of the common law, before the changes as to primogeniture and preference of males and the prohibition of ascent in time of Henry I., as still the law by which the statute of distribution, was to be construed; the alteration not having extended to personal estate. He says: "The laws of England, and not any foreign laws ought to govern this case." And he concludes that if the case was controlled by the Civil law, it was by that law as known in 1100, the time of Henry I, and not by the laws of Justinian, which were not discovered until 1125, and had for centuries been everywhere disused. But the rule laid down by Chief Justice North, was adhered to and adopted in *Maw v. Harding*, 1791, 2 *Vern.* 233; in *Walsh v. Walsh*, *Finch's Prec.* 54, decided in 1695; in 1700, by the King's Bench on application for mandamus in Pett's case, 1 *P. W.* 25; *Holt R.* 259; 1 *Salk.* 250; 1 *Lord Raym.* 571; and in 1719, by Lord Chancellor Parker, in *Bowers v. Littlewood*, 1 *P. W.* 593.

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If the courts in construing the statute of distribution thus felt constrained to adopt the rule of the Civil law, cause that was the law by which such matters had determined, and the law of the ecclesiastical courts, which before had, and still retained that jurisdiction, and because the act had been drawn and procured by an eminent civilian, who probably used the term, "next of kindred," in the sense established in that law; the same reasoning should make them adopt the common law rule, in interpreting the statute, concerning the descent of real estate; a matter which had always been governed by the rules of the common law, and had been held, most peculiarly, subject to these rules, and exclusively under the jurisdiction of courts of law. There is hardly any case, in which the Civil law has been referred to in such matters; none in which it has been taken as the guide.

Nor is this matter affected by the consideration, that the act of descents having used the same term which had been used in the statute of distributions, the meaning of which had been settled at law, it should have the same meaning here. It is not the same term; "next of kindred," and "equal degree of consanguinity," are radically different. The latter peculiarly applies to the descent of real estate by its very structure, referring to the common ancestor through whose blood the estate is supposed to come, and most appropriately used to express the common law rule which calculated only the degrees of the intestate from the common ancestor, and held all from his blood in the same degree. Besides, the same word is often used in different meanings in different statutes, when as here, it is applied to a different subject matter. And here, there is not the necessity, as in the statute of Connecticut, to apply one or the other of these meanings to both subject matters, because they were connected in the same sentence.

This is the situation of the case: Law judges of the highest authority, have intimated opinions different from the view taken by me of the question in the cause; a

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my own opinion is settled in such way, that it can only yield to a determination by the courts of law, to whom this question, and every question as to the descent of real estate, properly belongs. It is, therefore, right that I should not determine the cause, without sending the question to the Supreme Court, for their opinion to be certified upon it. But the matter involved is less than \$400, and unnecessary costs should be avoided. Such a question may, and probably will eventually, be taken to the Court of Appeals for settlement there, and as it can be settled there with little more delay or expense than in the Supreme Court, I will decide the cause here upon my own view of the case, and overrule the exceptions.

VAN KEUREN and others vs. McLAUGHLIN and MALLORY.

1. When it appears at any time before final decree, that a person not made a party is a necessary party to the suit, courts of equity will, of their own motion, arrest the proceedings, that such person may be made a party.

2. A person who has an interest in property which is the subject matter of a suit, is not a necessary or proper party if his interest cannot, in any way, be affected by the result of the suit. But if it is necessary to have such person in court to settle all or part of the questions in controversy between the parties, he is a necessary party to the suit. The general test is the interest of such person in the object of the suit, sometimes called its subject, in contra-distinction to subject matter.

3. No person is a necessary party against whom the complainant is entitled to no relief, and as against whom, at the hearing, the bill must be dismissed.

4. By a general assignment for the benefit of creditors, the equity of redemption in mortgaged premises vests in the assignee, whether the mortgage deed is absolute or conditional on its face. But property which the debtor has fraudulently conveyed to hinder and delay creditors, which he could not convey to strangers, does not pass by such assignment.

5. Money due at the time of such assignment, to the assignor from purchaser to whom he had assigned his property to defraud creditors, will belong to the assignee. And if the purchaser, after the assignment, pay it

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to the assignor, it is no bar to the right of the assignee; the payment ~~is~~ in his own wrong.

6. But a court of equity will not, in a decree which declares such ~~sale~~ void as against the complainant as a judgment creditor, direct the purchaser ~~to~~ to pay or account for the proceeds to the assignee.

7. When a creditor of the debtor making an assignment for the benefit ~~of~~ creditors, who has not exhibited his claim to the assignee, discovers that ~~at~~ lands of the debtor not sold or administered by the assignee, had been conveyed by way of mortgage only, though by deed absolute on its face, such creditor is entitled to his pro rata dividend out of the value of the ~~equity~~ equity of redemption, as property found by him and not accounted for ~~by~~ the assignee before distribution.

8. The ratable proportion of such creditor is, in the first place, to be paid on his claim the same per centage as the other creditors have received who ~~have~~ duly presented their claims, and then to have the residue of such new ~~found~~ found property distributed equally between him and such creditors.

This cause was argued upon final hearing on the amended ~~bill~~ bill, answers, and proofs.

Mr. Ransom, for complainants.

Mr. Williamson, for Mrs. McLaughlin.

Mr. J. F. Randolph, for Mallory, assignee.

THE CHANCELLOR.

This cause was argued between some of the parties, on its merits, and decided at the May term, 1868. The controversy then was between the complainants, who were judgment creditors of James McLaughlin, and Michael McLaughlin, the father of James, to whom he had conveyed his real estate, shortly before the entry of the judgment of the complainants. The matter in controversy was, whether these conveyances to Michael were fraudulent, and void, as against the complainants, who alleged that they were made to defraud and delay them, and without adequate consideration, or that they were at best, mortgages, to secure the real amount due from James to his father.

This court at the hearing, supposed that the only subject

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Of the controversy was the validity of those deeds as against the complainants' judgment, and that the object of the suit was to have them declared void as against it. And although, it appeared in evidence that James had made an assignment to J. F. Mallory, for the benefit of all his creditors, the day before the entry of the judgment of the complainants, yet, as the title of Mallory could not be affected by any decree in this cause, while he was no party, as the fact of the assignment did not appear in the pleadings, and its validity was not contested, the hearing was proceeded in without directing him to be made a party. This was done under a mistaken application of the rule, that the interest which requires persons to be made parties, is an interest in the question in controversy, or in the object of the suit, and not a mere interest in the property that is the subject matter of the suit, that cannot be affected by it. The rule laid down by *Story's Eq. Pl.*, § 72, "that it is not all persons, who have an interest in the subject matter of the suit, but in general, those only who have an interest in the object of the suit, who are ordinarily required to be made parties;" and by Calvert, in his treatise on parties to suits in equity, p. 10, "the propriety of a person being made a party, depends upon his interest, not in the subject matter, but in the object of the suit," has been the rule adopted and acted on, in this court. A mortgage made, subject to a prior mortgage, or to a lease, or to a life estate, or on land encumbered by ground rent, or by tax assessments, which take precedence of all interests in the lands, has been allowed to be foreclosed without making the prior mortgagee, lessee, life tenant, owner of ground rent, or the municipal corporation to whom taxes were due, parties, although in these cases, such persons have a clear interest in the land, which is the subject matter of the suit. The rule has been that it is not necessary to make any one a party, against whom the complainant does not ask, and is not entitled to any relief, and as against whom the bill must be dismissed, with costs, upon demurrer, or at the final hearing.

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This rule, as applied to such cases, I apprehend it was the intention of the Court of Appeals* to abrogate, although an expression in the opinion of the court as delivered, referring to "the right of all persons interested in the subject matter of the suit," might, taken by itself, lead to that inference. If such had been the intention, the persons who appear to hold the previous mortgages on these lands would have been directed to be made parties, as well as Mallory.

But in this case it appears that the rights of the complainants as against the original defendants, and the property in question, cannot be settled, without first adjusting the claims of the assignee against Michael McLaughlin, that part of the claim of the complainants must be brought through that assignee; and the assignee became a necessary party to the suit. This matter was not called to my attention, and escaped my observation at the first hearing. The Court of Appeals perceiving the difficulty, did what courts of equity have power and are bound to do at any stage of a suit before its final determination; it arrested the hearing of the cause, that the proper party might be brought in and remitted the record for that purpose. For that cause alone, and for that purpose, the decree was reversed.

Mallory, the assignee, has now been made a party, proper amendments to the bill, and has filed his answer claiming that if the conveyance to Michael McLaughlin shall be adjudged void, he is entitled to receive the property in trust for the general creditors, as the assignment to him was executed and recorded the day previous to the judgment of the complainants.

Michael McLaughlin having since died, Catharine McLaughlin, his universal legatee and devisee, and the executrix of his will, has been made a party in his place.

The question between the complainants and Mrs. McLaughlin, has been submitted by counsel, without any

*The opinion of the Court of Appeals was delivered at March Term, and will be found in the latter part of this volume.

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argument, and upon the same evidence as at the first hearing of the cause. My opinion upon that question remains the same. I think that the two deeds first given by James to his father, were given in good faith, to secure to his father a debt honestly due, and were valid mortgages to that amount; and that the transaction of July 9th, 1866, by which these deeds were to be absolute, and another deed was given, and the Clark mortgage assigned, was intended to delay and defraud creditors, and was void as against the complainants; and further, that without regard to such fraudulent intention, the deeds of May 19th, 1866, being given, as admitted by the answer, as security, were mortgages only, and that they could not be changed into absolute deeds, and the equity of redemption released by a parol agreement without writing.

A new question arises in this case, as now presented, upon the rights of the assignee. His title is by virtue of the assignment. That, by its true, proper effect, conveys to him all the property included in its words, that is, "all the real estate whereof James McLaughlin was then seized or possessed, or in any way entitled to, and also all and singular his goods and chattels, bonds, notes, books of account, contracts, rights and credits whatsoever and wheresoever." These the assignment would convey by its own efficacy, without the aid of the statute. The fourth section of the statute declares that the property conveyed shall not be limited by the inventory annexed, but the assignee shall be entitled to any other property which may belong to the debtor at the time of the assignment, and comprehended within the general terms of the same. And in the thirteenth section it declares that the assignee shall have as full power to dispose of, and recover all the property of the debtor, as he himself had at the assignment.

Then as the deeds of May 19th, are held to be mortgages, and the equity of redemption is not released by the parol contract, but vested in James at the assignment, it passed by it to Mallory, and he as trustee for the creditors is entitled to it.

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With regard to the lot conveyed on July the ninth, the question is different; that was conveyed absolutely and not by way of mortgage, but the conveyance was to defeat creditors, and as to them it is void. Neither the terms of the assignment nor the provisions of the act, vest this in Mallory. It was not real estate of which James was seized or possessed, or in any way entitled to, at the time of the assignment. Nor does the fourth section of the statute affect it; it did not then belong to the debtor, neither was it included in the general terms of the assignment. Nor was the assignee authorized by the thirteenth section to convey it, for James could not then have conveyed it. The conveyance to his father, though void as to creditors, was valid as against him.

If the transaction of the ninth of July had not been held to be fraudulent, and the release of the equity of redemption void, as being by parol, the sum of \$5000, to be paid by Michael to his son, which was not paid until October eighth, would have been at the date of the assignment a debt of James to his father, and both by the terms of the assignment and the provisions of the act, would have passed to the assignee; and the payment made by the father to the son would have been void as against the assignee, without any reference to the evident object of both father and son to defraud creditors in making that payment. But in a judgment which declares that conveyance void, the payment of the consideration cannot be enforced.

The mortgage of Clark is different. The assignment of that to the father, is not and cannot be declared void in this suit. Other parties who are interested are not before the court. But by the answer of James and Michael, that mortgage was transferred to Michael, not for himself, but to raise money for James; at the time of the assignment to Mallory it was held in trust for James, was his property, and clearly passed to the assignee. The money raised by Michael on it by the transfer to Hibbler, wherever that was done, belonged to James, and as it was not paid to him until October 8th

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the payment did not absolve Michael from his debt to the assignee. Michael clearly owed that amount to the assignee; and as in this suit as it now stands, the two tracts first conveyed are held by the assignee, subject to the debt to Michael, which they were conveyed to secure, in taking an account of that debt as between the devisee and executrix of Michael, this amount must be deducted, and those lands be held only for the balance. In a court of equity where the parties are before the court, all questions in controversy will be determined between them to avoid all further litigation. Therefore, for this matter, it is of no importance whether this deduction is authorized by the statutes of set off, or the rule adopting them in equity.

The complainants are entitled to a decree that the deed of July 9th, 1866, to Michael McLaughlin, is void as against their judgment, and that the lot described in it did not pass to Mallory by the assignment.

The proceeds of the sale of the lots conveyed in the two deeds of May 19th, subject to the claim of the executrix of Michael McLaughlin for the balance due him, belong to Mallory, as trustee for the creditors of James.

The next question is, to what creditors, and in what proportion. The assignee has settled his final account, but that does not terminate the trust or put an end to his power to recover other property. But no creditor who has not exhibited his claim within the time limited, can come in for a dividend, unless the estate is sufficient to pay all, or unless he shall find some estate not accounted for by the assignee before distribution. This estate, this equity of redemption, and the bond and mortgage of Clark, did not come to the possession of the assignee, and were not accounted for by him; he settled his final account, and closed his trust without them. And it is clear that the complainants have in these such rights as are given by the eleventh section. The question arises, what is meant by the words "a ratable proportion therefrom." The complainants contend that they are entitled to the same proportion of their debt from this prop-

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erty, that the other creditors received from the assignee that is 66.27 per cent. of the whole debt, and if anything remains, then to an equal proportion on it with the creditors whose accounts were duly presented, to the extent of the whole debt. The assignee contends that the newly found property must be divided between the complainants and the creditors, in proportion to the original debts due to each.

The words are somewhat vague, and will perhaps admit of either interpretation. The first and natural meaning of the words appears to me to be, that a ratable proportion here means the same as the other creditors had received. The act does not direct the fund to be divided ratably between them and the other creditors, nor does it say a ratable proportion *thereof*, the natural expression if it was intended to be divided among all, and which would exclude the estate before divided. But if the words contained no guide to the interpretation, and either construction could be put upon it, the duty of the court is to put such as would be most consistent with justice and equity. In dividing property among such as have an equal claim thereto, the rule is "that equality is equity;" and it is clear that in this case to give to the complainants out of the property which they have discovered, first, the same proportion as the other creditors have received out of that discovered by the assignee, and then to give them a pro rata share in the excess, is equality. The statute excludes those who have not presented their claims within a time limited for that purpose, but this is because it is necessary that a time should be limited that the estate may be settled up. The omission is no wrong, and by it such creditor should not be deemed to have forfeited any right except that which the statute takes away. And the act should be so construed as to induce creditors to find out the concealed property of debtors who make assignments, by placing them on an equal footing with creditors who have taken no pains to discover and defeat fraud. *Vigilantibus non dormientibus leges subservient.* In many cases, debtors having the choice of the

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assignee, make the assignment to some personal friend, who will not look into or contest transfers made to relatives or personal friends, to preserve property for the debtor; this may have been the case where about one-half of the estate was so transferred. And a creditor who is not willing to come in under such an assignee, but will seek discovery, and reach such property, should have at least the same share of it, as the others received of the estate surrendered by the debtor, as a reward of his energy to encourage such attempts. Again, if the creditor who finds property could only have out of such property a ratable proportion with that which the other creditors are to secure out of the same, then in this case, as the other creditors can only receive 33.73 per cent. of their debts, being the balance due upon them, the complainant can only be paid that proportion of his debt, although there is abundance to pay the whole of it. The construction to be given to this section therefore must be, that the creditor who finds other property is entitled to be paid ratably with the other creditors to the full amount which they have received, or shall receive on their claims, provided the property so found is sufficient for that purpose.

The complainants are on these principles entitled to have: First. The lot conveyed by the deed of July 9th, 1866, declared subject to their judgment, and the proceeds of sale applied to the payment of it; secondly, to have the amount due from James McLaughlin to the executrix of his father, on account of the debt of \$7608, which the deeds of May 19th, 1866, were given to secure, and now due, ascertained by deducting from the principal the principal due on the mortgage from Clark and wife to James, on the 9th day of July, 1866, when it was assigned to Michael McLaughlin, and the interest then due on that mortgage, from the interest due to Michael McLaughlin on the debt to him from James; thirdly, out of the surplus of the proceeds of the property conveyed to Michael by the deeds of May 19th, 1866, over the amount due to his executrix so ascertained, the complainants are entitled to be paid, first, such amount as with

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the sum realized by them from the sale of the lot conveyed by the deed of July 9th, 1866, will pay 66.27 per cent. on the amount due on their judgment on the first day of February, 1867, when the dividend was paid to the other creditors, and next, out of the residue, a ratable proportion with the creditors who presented their claims to the assignee, in proportion to the amount of such claims then unpaid, not to exceed such amount.

And for this purpose there must be a reference to master to ascertain and settle such amounts, and when ascertained, the property must be sold under the direction of the court, by a master to be designated for that purpose.

 THE INHABITANTS OF THE TOWNSHIP OF WINSLOW
HUDSON.

1. The questions, whether, under an act to authorize a township to "bonds to raise money to pay to such persons, who had or might volunteer in the army of the United States," bonds could be issued, or raised for drafted men, or for any one but volunteers; whether a majority of the town committee, without a regular call for a meeting, could lawfully fill up, or seal, or deliver a bond; and whether they could do this in a place out of their own township; are proper to be determined by the courts of law, and by them only, and this court will not restrain a suit at law, in which these questions fairly arise, that they may be determined here.

2. Where the allegations of the bill, which, in such a case, might give a court of equity jurisdiction, are fully, directly and circumstantially denied by the answer, the denials, must, on a motion to dissolve upon bill and answer, be taken as true, and the injunction issued to restrain the suit at law be dissolved.

On motion to dissolve injunction.

Mr. P. L. Voorhees, in support of the motion.

Mr. A. Browning, contra.

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THE CHANCELLOR.

The complainants, "The Inhabitants of the Township of Winslow," filed their bill to restrain the defendant from prosecuting a suit brought by him on their bond for \$500. The bill states that by an act approved February 22d, 1865, the complainants were authorized to issue bonds to raise money to pay to such persons who had or might volunteer in the army of the United States, and that at a town meeting held five days afterwards, they directed bonds to be issued for that purpose, and authorized the town committee to present to each drafted person, who would answer the call, or furnish a substitute in his stead, \$600 of said bonds. That the defendant, who, on the 15th of February, had been drafted as one of the quota of twenty-seven men required of the township of Winslow, on the 14th of March, before he had reported himself to the Provost Marshal, or been accepted or mustered in, applied to three of the township committee for the \$600 so directed to be given to each man who should answer the call, and promised that if he did not have to go in the army himself, or did not send a substitute, that he would return the bounty to the committee. That he stated that he was a clergyman, and a man of character, and referred to Mr. A. K. Hay, a well known and prominent citizen, for his standing, and said that his word might be trusted for the return of the bounty. That the three members of the township committee, at Camden, out of their own township, and in the absence of the other members of the committee, filled up a printed bond, which they had with them, signed by all the committee, with the name of the defendant, and the sum of \$500, and affixed a seal to it, and handed it, with \$100 in money, to the defendant, upon the promise that he would return the whole if he did not go into the army, or send some one in his place. That the defendant did not go into the army, or send a substitute in his place; that the war came to an end, and the soldiers drafted were not and would not be required; that the

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defendant refused to return the bond, but has put the ~~suit~~ in suit. The bill is to restrain the suit at law, on the grounds that the bond was delivered without authority and illegally, and that the complainants could not set up, at law, the non-performance of the condition on which the bond was delivered.

The legal questions whether, under this statute, bonds could be issued, or money raised for drafted men, or for any one but volunteers; whether a majority of the town committee, without a regular call for a meeting, could lawfully fill up, or seal, or deliver a bond; and whether they could do this in a place out of their own township; are proper to be determined by the courts of law, and by them only, and this court will not restrain a suit at law on which these questions fairly arise, that they may be determined here.

As to the conditional delivery of the bond, and the fraudulent conduct of the defendant in refusing to give up the bond, and in bringing suit upon it, which, perhaps, might give a court of equity jurisdiction, the answer fully, directly and circumstantially denies all the facts alleged in the bill upon which that equity depends. It denies that the defendant made the representations stated concerning his profession or character, or that he referred them to A. K. Hay, or that he promised to return the bond and money if he should not go into the army, or procure a substitute. And in reference to other allegations of the bill, he answers that he reported himself in pursuance of notice, to the office of the Provost Marshal, as one of the men drafted to fill the quota of Winslow township; that he was examined and accepted by the board of enrollment, and was enrolled and credited to the quota of the township, and became subject to the regulations of the army; that he was twice furloughed by the government officers, and each time reported himself to the rendezvous.

These facts, stated in answer to the charge that he did not answer the call, must, on this motion, be taken as true, and if true, answer the whole equity of the bill. If the

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defendant had made all the representations and promises charged in the bill, he fulfilled them. The real object of the act, and of issuing bonds, was to fill the quota of the township, and free the other inhabitants from the draft. The defendant, by reporting himself and being accepted and enrolled, belonged to the army of the United States, was subject to military rule, and if he went away, was subject to punishment as a deserter. The government having accepted him, were bound to keep him at their own risk; if he was killed, or had died, or had deserted, they could not have called upon the township to supply his place on that draft.

That the war so soon came to an end, and that he received his bounty for small services, was his good fortune, and he is entitled to the benefit of it; he would have been required to make the much greater sacrifice, for which his bounty would have been totally inadequate, if he had lost his limbs or health in the war, or even if he had fully performed the three years' service in the field. If the answer is true, I see nothing inequitable in his retaining the bounty.

The injunction must be dissolved.

SPRING and wife vs. FISK and wife.

When the condition of the bond provides that upon failure to pay the interest within a definite time after it becomes due, the principal shall become due, mere negligence or forgetfulness as to the place where or person to whom it is to be paid, will not excuse the non-payment, and the contract will be enforced.

This cause was argued on final hearing, upon the pleadings and proofs.

Mr. A. S. Jackson, for complainants.

Mr. Abbett, for defendants.

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THE CHANCELLOR.

This suit is for the foreclosure of a mortgage given by W. Sargent, to the complainant, Abby G. Spring, wife of the complainant, Gardner Spring. The mortgage is dated October 21st, 1867, is payable October 21st, 1870, with interest, payable at the end of every six months from date, and a provision that the whole principal sum shall become due, if any installment of the interest should not be paid within ten days after it became due. The mortgaged premises were conveyed to the defendant, James Fisk, junior, in October, 1868, subject to the mortgage to Mrs. Spring, which had been recorded at length in the office of the clerk of Hudson county, in which the property is situated, on the day of its date. Fisk, by his agent or counsel, paid the interest which fell due in October, 1868, to S. G. Babcock, business agent of Mrs. Spring, in November, 1868. The installment which fell due April 21st, 1869, was not paid within ten days, and thereupon Babcock wrote a note to Fisk, stating the fact, and that he would require the whole of the principal to be paid, according to the condition of the mortgage. Fisk, by his agent, Morgan, on the 8th day of May, 1869, tendered the amount due for interest on the same to Babcock, as the agent of Mrs. Spring; this was refused to receive; he also refused to give information as to the residence of Mrs. Spring, saying that she left her business with him, and that he alone would attend to it. Fisk or his agents then did not know the residence of Mrs. Spring, the mortgage styling her of the city of New York, without giving the name of her husband, who was a well-known clergyman in that city, and his name would have apprised the defendant of her residence, which, without this, could not be ascertained from the directory.

The evidence shows that Seth G. Babcock, the agent of Mrs. Spring, had an established regular place of business in the city of New York, and I am satisfied from the evidence that notice was given to Fisk, or the agent of Fisk, in the purchase, at the time of the purchase, that Babcock

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such agent, and that the interest was to be paid to him. E. A. Babcock, who was present as counsel for Sargent, at the time of the transfer to Fisk, states with considerable confidence, that he told this to Fisk himself, and gave him a memorandum of his name and place of business. In November, 1868, the counsel of Fisk wrote to Seth G. Babcock, inquiring where the interest was to be paid, and sent it to him at his place of business in two days after receiving an answer. The insurances on the property were renewed by Fisk, and the renewals sent to Babcock in December, 1868, and January, 1869. The counsel of Fisk borrowed of Babcock, the abstract of title given to Mrs. Spring on her making the loan and retained it until May, 1869.

There is no dispute as to the fact that this interest was not paid or tendered, until after the ten days had expired. The only question is, whether the non-payment is excused by accident, mistake, or inadvertence, in such way, as by a court of equity the forfeiture of the credit should be avoided. The defendant does not allege that he did not know of the mortgage, or of the time when the interest became due, or of the time of forfeiture. As the mortgage was recorded at length, he is presumed to have known these facts, and if it was shown that he did not, ignorance arising from such plain negligence would not excuse him.

The defence is, that he did not know where, or to whom the interest was to be paid. The direct proof, confirmed by the circumstances of payment of the previous interest to Babcock, the sending the renewals of the insurances to him, and the borrowing of the abstract of title from him, satisfies me that the agents of Fisk, to whom he entrusted the purchase of this property, the payment of the interest and renewals of the insurance, knew that S. G. Babcock was the agent of Mrs. Spring, to whom the interest was to be paid; and the evidence of E. A. Babcock, uncontradicted by Fisk, is sufficient to show that Fisk had definite notice of this fact himself.

The only question then to be considered is, whether when

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a mortgagor or his agents, by inattention or inadvertence, overlook or forget the name or residence of the person to whom the interest is to be paid, this shall excuse payment of it in the time stipulated, so as to prevent the principal from coming due, as provided in the mortgage.

The excuse in this case is not accident, or mistake, or even inadvertence, in the sense in which that term is used in such case in equity, but it is mere negligence. It was the duty of the defendant, or his agent, to recollect or make a note of the person to whom, and the place where the interest was payable. A man of moderate business, owning but one house subject to a single mortgage, would and could recollect this. If the defendant, as would seem, was a man of large property, which required agents to take charge of it, he or they should have kept memorandums; not to do so was negligence, and such omission would, if allowed as an excuse in all cases, excuse the wealthy from paying any attention to these provisions. And it was, besides, easy to have inquired of Sargent or of Babcock where this interest was to be paid.

These provisions in mortgages are intended to guard against negligence as well as against bad faith. Persons who loan money ought not to be prevented by any rule to be established as equity, from thus providing against negligence. The simple excuse that the mortgagor had forgotten the time when the interest became due would be good against these provisions, if the excuse that he had forgotten the residence of the mortgagee, or the name of his agent, is allowed. I do not feel willing to adopt the principle that in a case like this, mere negligence will excuse the payment at the day, and avoid the consequence of non-payment.

These are not cases of forfeiture; these provisions forfeit no right that the mortgagor had, not even a right to credit. That right to an extended credit for years, by the agreement between the parties, he was only to have on condition that he paid the interest within a stipulated time. A mortgagee who needs her money for support and the necessaries.

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of life, has the right to say to the borrower that she will not lend him her money for a term of years, or at all, unless he will bind himself to pay the interest in a reasonable time after it falls due; else she might suffer by want of comforts, for which she relied upon that income, that would only go to her heirs after she had passed away. Hence, courts of equity, which allow of no penalty for the non-payment of money by a negligent or faithless borrower, have approved and do enforce stipulations of this nature, and I know of no case in which they have not been enforced on account of the mere negligence or forgetfulness of the mortgagor. Chancellor Walworth, in *Noyes v. Clark*, 7 Paige 179, says: "The parties to the original agreement had an unquestionable right to make the extension of credit depend upon the punctual payment of the interest at the times fixed for that purpose. And if, from the mere negligence of the mortgagor in performing his contract, he suffers the whole debt to become due according to the terms of the mortgage, no court will interfere to relieve him from the payment thereof according to the terms of his contract."

In *Baldwin v. Van Vorst*, 2 Stockt. 581, Chancellor Williamson, says: "If the court relieves the defendant it destroys the very object of the agreement to secure prompt payment. The parties have made this the essence of their contract, and when the debt is as large as this one is, prompt payment of the interest is matter of great consequence. Interest upon interest might be a fair compensation. But this mode of redress deprives the party of the benefit of his contract. It will not secure prompt payment in the future." "If the court grant this relief the very object of the agreement will be defeated, and this court virtually declares that the parties shall not make an agreement by which the length of credit shall depend upon the prompt payment of the interest as it becomes due." This decision of the Chancellor having been affirmed in the Court of Appeals, without any opinion delivered, it is fair to infer that his reasoning was approved and adopted. And Justice Dalrymple, in

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delivering the opinion of the Court of Appeals, in *De G v. McCotter*, 4 C. E. Green 533, says: "If the non-payment of the interest falling due in May or August, happened the negligence of the defendant, the forfeiture has incurred, and the contract will be enforced as well in equity as at law." Such was the ruling of Chancellor Williams in the case of *Baldwin v. Van Vorst*. In the decision in that case, as well as the reasoning by which it is supported I entirely concur.

The complainant is entitled to a decree.

BRUMAGIM vs. CHEW.

1. A writ of error to remove a cause from this court to the Supreme Court of the United States, filed within ten days, Sundays excluded, of the day of filing in this court a decree of the Court of Appeals, is a writ *sedens* under the twenty-third and twenty-fifth sections of the judiciary act of the United States, to stay execution.

2. The "rendering the judgment." or "passing the decree" complained of, from which the ten days begin, is the filing of the judgment of the Court of Appeals in the court below.

3. A writ of error may be directed either to the highest appellate court of the state where the judgment complained of was rendered, if the record still remains there, or to the court below, if the judgment and record have been remitted. But it must be directed to the court where the record remains.

4. When the record has been remitted to the court below, and the writ of error directed to it, the entering the decree or judgment of the highest court in the court below is to be taken as the time of rendering the judgment or passing the decree complained of. And such decree only becomes a judgment in the sense of the twenty-third section of the judiciary act, when entered in a court from which execution can issue.

This was a motion that an execution should issue in this case on the decree of foreclosure made in this court, affirmed in the Court of Appeals, although a writ of error to remove the cause to the Supreme Court of the United States

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States has been filed, and the citation issued and served. The affirmance was entered in the Court of Appeals April 4th, 1870. The decree of affirmance with the record was remitted to this court, and filed April 22d, and the writ of error filed May 4th, being exactly ten days, excluding Sundays, from the filing of the decree of affirmance, but more than ten days from the entering the of decree in the Court of Appeals.

Mr. E. T. Green, in support of the motion.

No appeal lies to the United States court, where the controversy turns exclusively upon the validity or interpretation of state laws. 1 *Abbot's U. S. Practice* 329; *Congdon v. Goodman*, 2 *Black* 574.

A *supersedeas* of a decree in Chancery can only be had by giving a bond on the appeal within ten days, pursuant to section twenty-five, *act of Congress of 1789*. 7 *Cranch* 278; *Adams v. Lard*, 16 *How.* 144; *Stafford v. Union Bank*, *Ibid.* 135; *Orchard v. Hughes*, 1 *Wall.* 73.

Mr. E. P. Cowles (of New York), contra.

The facts upon which the motion is made, are as follows: On the 4th of April, 1870, the Court of Errors and Appeals decided the case, affirming the decree of the Chancellor. On the 22d April, the clerk of the Court of Errors and Appeals certified that decision and judgment to the clerk of the Court of Chancery, and remitted to the latter court the papers in the case, with such certificate. On the 4th of May, Chew sued out a writ of error to remove the record into the Supreme Court of the United States. The writ was allowed on that day by the Chancellor. At the same time he signed the citation, and approved the bond executed by the plaintiff in error. On the same day the writ, as so allowed, and the bond, as so approved, were all (with copies of each for the defendant in error), lodged with the clerk of the Court of Chancery, at Trenton.

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On the 10th of May, the citation was served on the solicitor for Mr. Brumagin, and service thereof admitted by him, and filed with the same clerk.

The counsel for Mr. Brumagin bases his motion for execution upon two points: 1st. That the citation was not filed with the clerk until the 10th of May. 2d. That the copy of the writ of error was not lodged with the clerk, within ten days next after the 4th day of April, 1870.

1. There is no provision of law which requires the citation to be lodged with the clerk simultaneously with the service of the writ of error upon him.

The *writ of error is served on the clerk*. The *citation is to be served on the party defendant in error*. The one takes up the record; the other is notice to the defendant in error that the writ is taken out, and cites him to appear and answer to it. The defendant in error is entitled to have this citation served on him twenty days before the return day of the writ. *This is the whole office of the citation*, and it may be served by any one. It is not made the duty of the clerk to serve the citation. *Act of Congress, September 24th, 1789, U. S. Stat. at Large, Vol. I, p. 84, §§ 22, 25. Brightley's Dig. U. S. Laws, 1789 to 1857, p. 258, §§ 2, 3.*

But even if there was any technical defect, as there was not, the admission of service of the citation on the 10th of May waived it.

2. The writ of error in this case operates as a *supersedeas* and stay of execution. *Act of 1789, § 23. Brightley's Digest, p. 258, § 3.*

The copy of the writ of error, by this section, is to be served "by a copy thereof lodged for the adverse party in the clerk's office where the *record remains*."

What office is that? Obviously, not the clerk's office of the court which possesses the record *temporarily only*, but that in which it is *permanently* and *finally* to remain. Not in the clerk's office of that court which has the record for review merely, and must, after review, remit it to another

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for execution, but in the clerk's office of that court receiving the record for final execution, is both to *receive the record* and execute the judgment. That, and that is the clerk's office, within the meaning of the act, in the *record remains*, that is, has its final resting place, *final record*, or, in other words, where it *remains of*

In no sense of the act does the *record remain* else-
than there.

ed, where the court of review has only the power of *reviewing*, but not of *executing* the *judgment*, but must *remand* it to another court for *execution*, the record of the *case* can never be considered as perfect until it has *passed* into the custody of the court which must receive it *for execution*. Until then, there still remains something *to be done*, before the judgment can be carried out *and enforced*; and so it is not until then a judgment on the execution is *to be stayed*; because, until then, no *stay* can issue, and there is none to stay.

Review is the only one consistent with the act itself, as *applicable* to the judgment in question. Because,

The New Jersey Court of Errors and Appeals is *not* a court of review, not a court of execution. *Nix. Dig.*, § 15; 1 *Zab.* 557, 561.

By law, the Court of Errors and Appeals was required *to remit* its judgment to the Court of Chancery for *execution*.

Would it be safe to address the writ of error to *that* court (the Errors and Appeals)? The plaintiff in error, *by* giving his writ in *that* court, would be liable to find that *the record* had already been remitted to the Chancery. In *such* case, the writ of error would be nugatory, and *proceedings de novo* would need to be initiated, for the record *neither remain* nor be in the court to which the writ *should*, in such case, be addressed. This possibility gives *substantial* force to the construction we claim for the word *remain*, as used in this section, as regards the record.

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3d. By section twenty-third, *execution is to remain stayed for ten days* whenever a writ of error may be sued out which would operate as a *supersedeas* and stay of execution.

This provision further shows, that this act contemplates that the writ of error is to be lodged in the clerk's office of the court, which is the court of execution, and that the *ten days* time to lodge such copy, means the ten days next after the judgment of the court of review has come into the possession of the court charged with its execution. But further, and,

4th. The judgment of the Court of Errors and Appeals was not a full and perfect judgment, in any sense, under this act, until all the costs of that court had been adjusted or taxed, and that was not done until the 22d day of April. Then, and not until then, was the record fully perfected, and remitted to the Court of Chancery for execution.

But the foregoing views are fully supported by authority. The Supreme Court has given construction to this act, and in accordance with the foregoing views. It was held: 1st. That where the judgment complained of has been taken from an inferior to a superior court for review, and the judgment after review, has been remitted to the inferior court the writ of error must be addressed to the inferior court, which possesses the record. *McGuire v. The Commonwealth*,

Wall, 382. 2d. That the "writ of error" stays execution provided the copy is lodged with the clerk of the court *within ten days*, Sunday exclusive, after the record reached the inferior court. *Green v. Van Buskerck*, 3 *Wall*. 448.

In the case at bar the record was remitted April 22d 1870. The copy of the writ of error was lodged with the clerk May 4th, two Sundays intervening between the April and 4th May; the latter day was within the required time.

The motion, we submit, should therefore be denied.

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THE CHANCELLOR.

The twenty-third section of the judiciary act of the United States, makes a writ of error to a Circuit Court a *supersedeas* to stay execution when a copy is lodged in the office of the clerk of the court where the record remains, within ten days, Sundays excluded, after rendering the judgment, or passing the decree complained of. The twenty-fifth section allows final judgments of the highest court of law or equity, in any state, in certain causes, to be removed to the Supreme Court of the United States; the citation in such case to be signed by the Chief Justice of the court rendering the decree complained of; and it provides that the writ shall have the same effect as if the judgment complained of had been rendered in the Circuit Court.

The question in this case is, whether "the rendering the judgment," or "passing the decree" complained of, from which the ten days begin, is the entry of the judgment in the Court of Appeals, or the filing of that judgment in the court below.

It has been settled in several cases in the Supreme Court, commencing with *Gelston v. Hoyt*, 3 *Wheat.* 246, that a writ of error may be directed either to the highest appellate court of the state where the judgment complained of was rendered, if the record still remain there, or to the court below, if the judgment and record have been remitted. But it must be directed to the court where the record remains. These decisions do not affect the question in this case, except so far as they show that within the ten days, and until April 22d, the writ of error might have been brought to the Court of Appeals, and a copy filed there, which would have made it a stay of execution.

But recent decisions of the Supreme Court have determined that when the record has been remitted to the court below, and the writ of error directed to it, the entering the decree or judgment of the highest court in the court below, is to be taken as the time of rendering the judgment or passing the decree complained of. And that such decree

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only becomes a final judgment in the sense of the twenty-third section of the judiciary act, when entered in a court from which execution can issue. *McGuire v. The Commonwealth*, 3 Wall. 382; *Green v. Van Buskerck*, *Ibid.* 448.

No execution can issue from the Court of Appeals in New Jersey, and the rule laid down in the last case, therefore applies here.

The motion must be denied.

WELSH vs. BAYAUD.

1. A receipt for \$100, part of the consideration of an alleged contract for sale of lands, which does not describe the land or mention the price to be paid, without any other memorandum in writing, is not sufficient to found a decree for specific performance. The property to be conveyed, and the price to be paid, must be designated with certainty.

2. Where the fee is in the wife, a contract by her husband for the sale of her land, would not, if enforced, give title. A decree to convey would be complied with by his giving a deed of bargain and sale, without covenants, upon payment of the consideration.

3. In a suit for specific performance upon such a contract, the husband could not be compelled to procure a conveyance from his wife, nor could she in such suit, in any other way, be compelled to execute it.

4. Nor can a decree be made for the repayment of the money paid on signing the contract, under a prayer for general relief in a suit for specific performance.

Argued upon final hearing, on bill, answer, and proofs.

Mr. C. H. Voorhis, for complainant.

Mr. Dixon, for defendant.

THE CHANCELLOR.

This is a bill for specific performance of a contract for the sale of lands. There is no contract in writing; there is a receipt for \$100 of the consideration, which does not de-

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scribe the land or mention the price to be paid. There is no other memorandum in writing. It is clear that this writing is not a compliance with the requisitions of the statute of frauds. For that purpose the writing must designate with certainty the property to be conveyed, and the price to be paid. *Browne on Statute of Frauds*, §§ 376, 385. The defendant has, in his answer, set up the statute of frauds; and it is a full and complete defence, both at law and in equity.

Besides, had the contract been in writing, it appears both by the answer and the evidence, that the defendant does not own the property; the fee is in his wife, who is not a defendant, and did not join in the contract. And the defendant cannot be compelled to procure a conveyance from his wife, nor can she in this suit, in any other way, be compelled to convey it. A decree for the defendant to convey would be complied with by his giving a deed of bargain and sale without covenants, upon being paid the full consideration. This would hardly be accepted by the complainant; he would lose the \$400, and would have no defence to his bond for \$2000, and would gain no title to the lots.

The complainant asks, under this view of the case, that a decree be made that the defendant repay the money paid on signing the contract, there being a prayer for general relief. The complainant may have the right to recover this money, but his remedy is at law, not in equity. No suit could be brought in equity to recover money because the consideration had failed. The complainant having failed on his only ground for equitable relief, cannot have his suit retained for granting a relief to which he is only entitled at law.

The bill must be dismissed with costs.

Winfield v. Henning.

WINFIELD vs. HENNING.

1. A covenant in a deed, "it being expressly understood and agreed, that the houses which may be erected on Gilbert street, shall be set back ten feet from the southerly line of said street," is a covenant running with the land, and binds not only those who derive title from the covenantors, but also their grantees.

2. At law, the purchaser of one of these lots from the grantee could not enforce this covenant against the purchaser of another of them. But, in equity, its observance will be enforced in his favor.

On motion to dissolve injunction, upon bill and answer.

Mr. Dixon, in support of the motion.

Mr. Ransom, contra.

THE CHANCELLOR.

The complainant owns a house and lot on the south side of South Fifth street, formerly called also Gilbert street, in Jersey City. The defendant owns a house and lot adjoining it on the west, and on the corner of South Fifth street and Coles street. These lots are part of a tract of one hundred feet square, at the southeast corner of Coles street and South Fifth street, which was conveyed by the devisees of John B. Coles to Keeney and Wheeler, on the first of May, 1854. In the deed the premises were designated by numbers, as four lots fronting on South Fifth or Gilbert street, and the deed contained this provision: "It being expressly understood and agreed that the houses which may be erected on Gilbert street, shall be set back ten feet from the southerly line of said street."

In May, 1857, Keeney conveyed his interest in this tract to Wheeler, who afterwards erected on it five two story houses of twenty feet front on South Fifth street, ten feet from the south line of the street. After they were built in

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May, 1858, he conveyed the house and lot of the complainant to a grantee, through whom the complainant derives title, and one year after this he conveyed the house and lot of the defendant to a grantee, through whom the defendant claims title. The stipulation as to the placing houses ten feet from the street, is not contained in any deed after that to Keeney and Wheeler. The grantors in that deed owned a large number of lots in the vicinity, some of which were on the opposite side of the street, and retained them after the deed to Keeney and Wheeler.

The defendant, in May, 1870, commenced erecting an addition to the dwelling-house on his lot, which would occupy the ten feet between it and the street, by which the westerly view or prospect from the front of the complainant's house is cut off. The injunction restrains the defendant from proceeding with, or completing that building.

There are two questions in the case are, whether the defendant is bound by the stipulation or covenant in the deed from the Coles family, and if he is, whether the complainant has any right to compel its performance?

The provision or covenant in the deed is not like that in *Spencer's case*, 5 Rep. 16, as was urged on the argument. It does not relate to something collateral to the land, but to the land conveyed itself. In that case the covenant was to erect a brick wall on an adjoining lot. Nor does it relate to a thing not *in esse*, as a wall to be built; but it relates to the ten feet of the tract next to the street, and the negative stipulation not to erect houses on that is, in its legal effect, to keep it free from buildings; this is the only legal effect of the covenant; it does not oblige the grantees or their assigns to erect buildings at that distance, or to erect any houses at all.

The stipulation names no one as bound, neither the grantees, their heirs or assigns, but it is annexed to the land and the grant of it, and must therefore be co-extensive with the estate granted, which is to them, their heirs and assigns. In a suit by the grantors there could be no question but that this stipulation would be enforced against any

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ance of the complainant's lot by Wheeler, who still retained **the** lot of the defendant, which was the dominant tenement; **and** this space being left open in compliance with a covenant **or** stipulation, binding on both lots, it might be held to be **an** apparent and continuous easement, to which the part **re-**
tained was thus made subject.

The motion to dissolve must be denied.

WALKER vs. HILL'S EXECUTORS and others.

1. The oath annexed to an answer to a bill which prays for answer without oath, though evidence against the complainant on a motion to dissolve the injunction, is not evidence on the hearing of the cause.

2. An agent attending a sale for his principal, has no right to buy the property at that sale for himself, or any one else than his principal, at a price less than would secure his principal's claim. He would be held a trustee for his principal, and any written or properly declared trust for any other, would be held subject to the first trust for the principal.

3. The testimony of a complainant, taken after the defendant's executors were made parties, but before either of them had been sworn as witnesses, is incompetent; and if such party is objected to as incompetent when offered, his testimony is inadmissible.

4. If a plaintiff in execution, make an agreement with the defendant that he will buy the property at sheriff's sale and hold it for his benefit, and takes advantage of such agreement to buy in the property at prices lower than he otherwise could have done, he will be taken to hold in trust for the defendant, who will be allowed to redeem. But a court of equity will not enforce such an agreement, being merely in parol, unless the fraud or *mala fides* be clearly and fully shown.

5. The mere non-performance of a beneficial parol agreement, is not a fraud which will induce a court of equity to compel performance.

6. It is the settled doctrine, that if the answer admits a contract without stating that it was not in writing and setting up the statute of frauds, the statute cannot be used as a defence. The admission will be held to be of a written contract, and no proof need be offered of it. But if the pleading or answer denies the existence of any agreement, the plaintiff must prove a written agreement.

7. Under the prayer for general relief, only such relief can be given as is warranted by facts positively and clearly set forth in the bill.

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owner of this tract, or any part of it, who derived his title through this deed.

The question whether the complainant is entitled to enforce this stipulation, is not so clear. If any purchaser of the other lots retained by the Coles family at the giving of this deed, and injured by this erection, was the complainant, the authorities are numerous and decided, that he would be entitled to the benefit of this stipulation. *Tulk v. Moxhay*, 11 *Beav.* 571; *S. C.*, 2 *Phil.* 774; *Barron v. Richard*, 3 *Edw. Ch.* 96; *Hills v. Miller*, 3 *Paige* 254.

But in this case both parties derive title from the covenantors, and not from the covenantee, and the question is, whether they are bound to each other by the covenants which Wheeler entered into with the Coles family, for the benefit of the property which they retained. An action at law could not be maintained by the complainant against the defendant on such covenant. But in equity their position is different. Both parties are bound to the grantors in the Coles deed to keep this front free from buildings; each is subject to the easement over his lot, in favor of those subsequently deriving title from Coles, and each is equitably and justly entitled to the advantage which the observance of this stipulation by his neighbor may be to him. If all were relieved from the encumbrance, none perhaps could complain. But to be restrained from extending his own building to the street, and to have his neighbor on each side project in front of him, would be a much greater grievance to any of these lot owners, than was contained in the stipulation in the deed through which he derived title; and he has no power to compel the grantors to enforce the covenant. It seems equitable that this court should, at his instance, compel the observance of this covenant. This view is supported by the dictum of Lord Romilly, in a case heard before him at the Rolls, in 1866, *Western v. Macdermot*, 1 *Eq. Cases (L. R.)* 507; and by a decision of the Supreme Court of Rhode Island. *Greene v. Creighton*, 7 *R. I. R.* 1.

This easement was in existence at the time of the convey-

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ance of the complainant's lot by Wheeler, who still retained the lot of the defendant, which was the dominant tenement; and this space being left open in compliance with a covenant or stipulation, binding on both lots, it might be held to be an apparent and continuous easement, to which the part retained was thus made subject.

The motion to dissolve must be denied.

WALKER vs. HILL'S EXECUTORS and others.

1. The oath annexed to an answer to a bill which prays for answer without oath, though evidence against the complainant on a motion to dissolve the injunction, is not evidence on the hearing of the cause.

2. An agent attending a sale for his principal, has no right to buy the property at that sale for himself, or any one else than his principal, at a price less than would secure his principal's claim. He would be held a trustee for his principal, and any written or properly declared trust for any other, would be held subject to the first trust for the principal.

3. The testimony of a complainant, taken after the defendant's executors were made parties, but before either of them had been sworn as witnesses, is incompetent; and if such party is objected to as incompetent when offered, his testimony is inadmissible.

4. If a plaintiff in execution, make an agreement with the defendant that he will buy the property at sheriff's sale and hold it for his benefit, and takes advantage of such agreement to buy in the property at prices lower than he otherwise could have done, he will be taken to hold in trust for the defendant, who will be allowed to redeem. But a court of equity will not enforce such an agreement, being merely in parol, unless the fraud or *mala fides* be clearly and fully shown.

5. The mere non-performance of a beneficial parol agreement, is not a fraud which will induce a court of equity to compel performance.

6. It is the settled doctrine, that if the answer admits a contract without stating that it was not in writing and setting up the statute of frauds, the statute cannot be used as a defence. The admission will be held to be of a written contract, and no proof need be offered of it. But if the pleading or answer denies the existence of any agreement, the plaintiff must prove a written agreement.

7. Under the prayer for general relief, only such relief can be given as is warranted by facts positively and clearly set forth in the bill.

Walker v. Hill's Executors.

This cause was argued upon final hearing, on the pleadings and proofs.

Mr. Vanatta and *Mr. Williamson*, for complainants.

Mr. C. Parker, for Hill's Executors.

Mr. T. Little, for McAlpine.

THE CHANCELLOR.

The complainant alleges that certain real and personal property, in the county of Morris, was held by the defendant, Hill, in trust for him. That the defendant, Van Buren, by a power of attorney procured from Hill, when Hill was of unsound mind and incapacitated for the transaction of business, sold the real and personal estate, except the library, to the defendant, McAlpine, who had notice of the trust, for a grossly inadequate price. The complainant prays that Hill be declared to have held the property in trust for him, with a lien thereon for the amount due on two judgments recovered by him against Walker, and that McAlpine may be declared to hold the part conveyed to him subject to the same trust, and that the complainant be allowed to redeem; and that the property, if necessary, be sold, after payment of the liens thereon, the residue of the proceeds of sale may be paid to the complainant; and that the sale to McAlpine may be declared illegal and fraudulent and set aside. It contains, also, the general prayer for relief.

The trust is stated in the bill to have arisen from these facts. The complainant, in April, 1857, confessed a judgment to Walker for \$2026, and in November following, another for \$1621. The real property was subject to three mortgages prior to the first judgment, amounting to \$21,300, besides interest, and another mortgage to A. W. Cutler, for \$3000, given in October, 1857. In 1862 Walker became embarrassed; he had

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Come security for New York merchants, who had failed in 1857, and left him liable for large sums, without consideration to him. That Hill was wealthy, and willing to allow time, and no sale had been made until May 2d, 1862, when all the personal property was sold under Hill's judgments and executions thereon, by the sheriff, and the whole, with the exception of a few articles amounting to \$123, was purchased by Hill. The personal property sold was worth \$17,000, but the sale amounted to only \$3089.23. The understanding between Hill and the complainant, when he purchased the personal property, was that he would hold the same as security for the complainant's indebtedness to him. That when complainant should pay that indebtedness, then the same should go to the use and benefit of the complainant and his other creditors, and that such was the intention of Hill. It was generally understood that Hill was bidding on the personal property for the use of the complainant, and because he was doing so the complainant permitted it to be sold at such low prices.

On the 26th of August, 1862, by virtue of these executions of Hill, and other executions, the sheriff sold the farm of 282 acres to Hill for \$20; and within a few months after this, four other tracts, containing about 42 acres, were sold by the sheriff, under these executions, to Hill for the sum of \$34.

One Atwater, who held a mortgage on the property, in a foreclosure suit obtained a decree to sell the real estate for the amounts due on his mortgage and two mortgages held by defendants in the suit. The amount due on these three mortgages, for debt and costs, was \$32,671.71, with interest from March 9th, 1864. On the 12th of September, 1864, when this sum with the interest and sheriff's fees amounted to nearly \$34,000, the sheriff sold the real estate to Hill for \$19,999, and conveyed it by deed executed shortly after the sale, but not delivered until two years afterwards.

All these purchases the bill alleges were made under the same understanding as that on the sale of the personal pro-

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perty, that is to say, that Hill would hold the property merely as security for complainant's indebtedness to him.

The answer of the defendant, Hill, entirely denies all the allegations of the bill as to his purchase of this property, or any part of it, in trust for Walker, or that there was any agreement or understanding for that purpose. On the contrary, he avers that the purchase at the foreclosure sale was made by him as agent of, and for the benefit of his brother-in-law, George Walker, to whom, as holder of the third mortgage, one-half of the money directed to be made by the decree, was directed to be paid, and who, before the sale, had through Hill as his agent purchased the Atwater mortgage, and was thus entitled to about three-fourths of the decree; that he intended to have made the purchase in the name of G. Walker, and applied to the sheriff to allow him to add the words "agent for George Walker" to his name, so that the deed might be made to George Walker; that the property, when sold to McAlpine, was sold at the request, and for the benefit of George Walker, for whom he had purchased it, and all the proceeds paid to him except \$2500 the value of the personal property, and the amount due to Maria Walker on the second mortgage.

This answer is sworn to, although the bill prays for answer without oath. The oath is legal, as it was proper and necessary to render the answer of use on a motion to dissolve the injunction, but it is of no value, and cannot be used as evidence on the hearing of the case.

In considering the question whether the allegations on which the trust is founded are sufficiently proved, I shall first assume that the complainant is a competent witness, and consider the value of his testimony. Hill died after filing his answer. After his executors were made parties, and before either of them had been sworn as witnesses, the complainant was sworn, being at the time objected to as incompetent by the defendants.

The complainant is the only witness who testifies to any agreement or understanding between him and Hill, prior to

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the sales, that Hill would buy in the property for his benefit, and this part of the case rests entirely on his testimony. The complainant labors under peculiar disadvantages; he is admitted by a statute derogatory of the common law, and of well established rules of evidence, and which expressly declares that his interest may be shown to affect his credit. By asking for answers without oath, he excludes the oath of the defendant Hill, admitted to be a man of character and respectability, who had been a generous friend, the only person who seems to have had any knowledge of the transaction, besides himself. Hill now being dead, the testimony of the complainant is against the policy of the statutes legalizing such evidence, which only intended to admit the evidence of one party, where the other could be produced to contradict or confirm him, it being intended to avoid the opportunity and temptation to perjury, weighing on a party who is testifying to a private bargain between himself and his dead adversary. The fact that this adversary in his sworn answer has denied the whole charge, cannot be used to discredit him any more than to contradict his testimony, but it calls upon the court to give grave attention to his evidence.

I have no doubt from the whole case that Mr. Hill intended to bid in the property at all the sales, and to dispose of it to pay the creditors of Walker, including himself, his brother-in-law, George Walker, and the encumbrances which were prior to his own judgments, and George Walker's mortgage, and that he did not intend or expect to make any profit for himself by purchasing it; and I have little doubt but that before these sales he said that he intended to bid in the property. But this is not the question here; it is whether he made any agreement with the complainant that he would bid it in, and hold it in trust for him and his creditors, after the amount of his bid, or of his own claim against the complainant, was repaid. Any declaration after the sale, by Hill, that he bought in trust for Walker or his creditors, or that he held it in trust for him and his creditors, would

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clearly be insufficient under the statute of frauds, or by any construction ever yet given to it, to create or to prove trust; it must arise from an agreement entered into before the sale, and acted upon at the sale.

Walker testifies that in the spring of 1862, he and Mr. Hill had a talk over the matter, and they agreed that they would have the property sold under the executions, "and that he would bid on it, or cause it to be bid in at the lowest possible sum, at whatever sum, more or less, he agreed to bid it in, without reference to his executions, and to hold it in trust for me till I got ready to pay him the sum bid by him, whether it was more or less." And again: "In this previous agreement that I had with Hill, in the spring of 1862, he agreed to bid off the personal estate and the real estate, and hold it for me subject to the encumbrances using his judgments and all others for that purpose."

Walker urged the sale under the Atwater foreclosure which took place August 25th, 1864, when he was out of the state; and he wanted Hill to buy it for the amount due on the first two mortgages, leaving George Walker's mortgage out. He testifies, "previous to this, before I went away Mr. Hill said, if the property had to be sold, he would bid it in, and hold it the same as at the other sale." Again When asked, what he was to pay Hill on surrendering the trust, he says: "The two judgments of April, 1857, and of November, 1857, amounting to \$3650, and the interest."

This is all the evidence of Walker on the subject; it is very meagre and unsatisfactory for so important a matter as this. He gives neither time, place, or circumstance, to these agreements. He does not give, or attempt to give the language in which they were made.

This testimony does not agree with the allegations in the bill, nor does the story first told by him in his testimony that Hill should buy it in and hold it until Walker paid the amount of his bid, agree with the last story, that he should pay the amount of his two judgments. These variations are not merely verbal, they are substantial. These state

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ments are utterly inconsistent with his testimony in the Atwater case, in September, 1862, after the sale in August, 1862, in which he states that he had no interest in the question, whether the Atwater mortgage was void for usury. He testified to a falsehood then or now.

The letter of Hill to Walker, in which he asks whether he shall sell the low meadows for \$400, and the Shelley meadows for \$150, do not support Walker's claim. It does not appear that either of these meadows were part of the tracts bought by Hill. It would seem from the papers in evidence, rather that they were part of the sixty acres owned by Walker outside of the farm, and the four tracts conveyed to Hill and included in the Cutler mortgage, which was afterwards assigned to Hill.

Cutler was, throughout, the agent and attorney of Walker, who was his brother-in-law. Hill's wife, who had been dead for years, was the sister of Walker and of Cutler's wife, and Cutler was the attorney or agent of Hill. Cutler was the person who bid off all the personal property for Hill, and who bid off the farm at both the sheriff's sales, and who as agent for Walker urged on the first sale, and who was written to by Walker to insist upon the foreclosure sale. Yet Cutler seems to have no knowledge of any such agreement as insisted on by Walker. It seems hardly possible that there should have been such an agreement, without his having knowledge of it from one or both, or that he should not have been present when the agreement was made. His letter to Hill in 1866, when in Bermuda, denying that he ever heard Hill say that he had bought in trust for Walker, is inconsistent with his having heard any such agreement; else it would be rank hypocrisy in both him and Hill.

The only part of Cutler's testimony that refers to any understanding or agreement between Walker and Hill regarding this purchase, is where he is speaking of the foreclosure sale. He is asked whether he understood, or supposed, that Hill purchased for his own use; he answers

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“that the understanding was, that Hill was to take the title for the benefit of the mortgagees.” To the question whether that understanding was arrived at in Walker’s presence, or talked of in his presence prior to the sale, his answer is a simple “yes;” which would be true if Hill had spoken of it to the mortgagees, or a stranger in Walker’s presence. When asked whether Walker assented or dissented, he avoided answering. These answers of Cutler show, both that he knew of no agreement between Walker and Hill, and that he did know what Hill’s object was in making the purchase, and that it was known to Walker; it was simply to protect the mortgagees. Cutler was the attorney, agent and friend of Walker; he was opposed to the sale made through Van Buren to McAlpine; it was made by summarily displacing Cutler from the agency given to him. Cutler was in the neighborhood, knew the property, and was so related to Hill and George Walker that he was entitled to their confidence. The sale was entrusted to Van Buren, who knew nothing of the property, or its value, and who hastily made an improvident sale for a price several thousands of dollars less than Cutler could have obtained. Cutler, naturally, I would almost say properly, was opposed to this sale, and the case shows that he did everything which he could do with propriety, to put a stop to it. Had he known of any understanding, or agreement of Hill with Walker, such as is claimed by the latter, he would have been willing, when thus plainly asked, to have disclosed it, fully and truthfully. More than this, if he had known of any such agreement or trust in any way, so that he believed it, he could not, with common honesty, have been silent on the day when the contract was made and signed, almost in his presence, and much to his dissatisfaction. He would not have said, as several witnesses testify, that the title was as good as any in the county; he would naturally have told the truth, and said “the title is held by Hill in trust for F. W. Walker, without whose consent Hill cannot sell, and I know Walker will not consent at that price;” both had com-

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missioned him to sell, but at a much higher price. Such an explanation would have effected what Cutler had at heart; it would have stopped this sale. But Cutler was truthful, and would not invent such a fiction.

From Cutler's evidence and his conduct, I am convinced that he knew of no such agreement or understanding with Hill, as that claimed by the complainant; and from his relation to these parties and to the whole transaction between them, I am convinced that such an agreement could not have existed without his knowing it.

In my view, the evidence of Walker is not supported by Vanderbelt and Mrs. Gleason. The admissions by Hill, that he held that property in trust for Walker, or that he bid it in to keep it for him until he should be out of trouble, to prevent it being sacrificed, might, if believed, be well held to refer to what his own object or intention was in buying it in; it shows no agreement with Walker, binding him to buy it, or to hold it for him. But the testimony of both these witnesses strikes me unfavorably. Vanderbelt's story of the confidential disclosure, as well as his accidental meeting with Walker, three weeks before his testimony was needed, is highly improbable, without regard to his mistake as to dates. The allegations as to Mrs. Gleason's character and her relations with Hill are not proved, and can have no weight against her credibility; but the whole manner of her testimony, as well as her statements with regard to Hill's incapacity, destroy her credibility. They strike me as two *procurable* witnesses, of the kind which the statute of frauds was intended to suppress.

There was no call at either sale for such a bargain as that contended for; nor is there proof of any sacrifice at either sale so far as regards Walker. The mortgages on the farm, at the sale in 1862, amounted to about \$28,000; and although the proof shows that in 1866 or 1869 the farm was worth \$40,000, it was the opinion of witnesses who did not know of the sale of any like farm in that vicinity, at that price, and none of whom testify as to its value in 1862.



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At that time all values were depressed by the war, commenced one year before, and when the large increase in prices of real estate in all localities had not yet taken place. At that time \$28,000 was, no doubt, a much larger price for his farm, than \$40,000 in the high prices of 1866 and 1869. There is no proof, and I do not believe, that this farm was then worth \$30, subject to the encumbrances.

There may have been some sacrifices as to the personal property. But the live stock was much depreciated, in bad condition, nearly starved to death. The furniture was old and old-fashioned, and such as does not bring high prices on sale by auction or otherwise. The sale was well attended; few others besides Hill bought, because he bid at higher prices than others were disposed to give, and they knew or supposed that the amount of his debt made it his interest to buy at any price; there is no proof of any impression that he was buying for Walker. The books may have sold below their value; but books in a library of this kind, never bring, and are seldom worth their estimated value.

At the time of the foreclosure sale, George Walker owned the decree and the first mortgage, and also the second mortgage, on which there was then due over \$25,000. Hill was his attorney and agent in these very matters, and attended the sale as such. There was due to Maria Walker on the second mortgage, about \$8000; in all about \$34,000. This was, as I judge, about the value of the property, at that time, if it was worth \$40,000 three years later. There is no proof of its value in 1864. Hill, if acting as the agent of George, had no right to buy the property at that sale for himself, or any one else than George, at a price less than such as would secure the claim of George. Like a solicitor attending for his client, he would be held a trustee for his principal, and any written or properly declared trust for any other would be held subject to this first trust for his principal. I am satisfied from the proof that Hill intended to purchase, and actually did purchase for George Walker at the foreclosure sale, and not for the complainant.

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Again : if I am mistaken in my view of the evidence of Walker, I am of opinion that he was not a competent witness ; and as there is no testimony but his as to any agreement before the sales upon which his purchases were made, this case must fail without his testimony.

At common law he was clearly incompetent ; and the statute of 1859, which permits a party to be sworn, expressly provides that a party shall not be sworn when the opposite party is sued in a representative capacity ; a very wise and proper provision, as this very case exemplifies. When Walker was sworn Hill was dead, and his executors were defendants. Incompetency at the time when he was sworn, is the test of the admissibility of his testimony, as was held in this court, and the Court of Appeals, in the case of *Marlatt v. Warwick and Smith*, 3 *C. E. Green* 108 ; 4 *Ibid.* 439. And he cannot be admitted under the provisions of the act of 1855, to disprove the responsive allegations in the answer, because here these allegations are no evidence, and therefore need not be disproved ; or his testimony at most could be admitted to do away with the effect of such responsive allegations as proof, leaving the burden of proving his case upon the complainant.

It has been held, and must be taken as the established doctrine of this court, that if a plaintiff in execution make an agreement with the defendant, that he will buy the property at sheriff's sale and hold it for his benefit, and takes advantage of such agreement to buy in the property at prices lower than he otherwise could have done, he will be taken to hold in trust for the defendant, who will be allowed to redeem. *Combs v. Little*, 3 *Green's Ch.* 310 ; *Marlatt v. Warwick*, 3 *C. E. Green* 108 ; *S. C.*, on Appeal, 4 *C. E. Green* 443 ; *Merritt v. Brown*, *Ibid.* 286 ; *S. C.*, on Appeal, June Term, 1869.

In this last case the opinion of the Court of Appeals delivered by the Chief Justice, shows the danger of extending any farther the doctrine of raising trusts by parol agreements, in derogation of the wise and wholesome provisions

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of the statute of frauds. It declares, in effect, that no *mere* parol agreement to purchase for the benefit of the defendant in execution will be carried into effect by a court of equity unless it is accompanied by circumstances of fraud, or if it has been made use of by the purchaser to obtain the property for an inadequate consideration, or to oppress the defendant, and in such cases to overcome the protection of the statute the fraud or *mala fides* should be proved by the clearest and most complete evidence. This is a most salutary and proper limitation of the doctrine, not inconsistent with former decisions, and necessary to save the provisions of the statute of frauds as to parol trusts, and to make bidders at sheriff's sales secure. Without this limitation any defendant who, after the death of a purchaser, would testify that he had promised before the sale to buy for him, or who could produce one witness to testify with him to the fact, in the life of the purchaser, could convert the purchaser into a trustee, and take from him the property when it had increased in value.

In this case, if we admit Walker as a competent witness and believe all that he has testified to, there is no proof of fraud in Hill, or that he has made use of the agreement to procure the property at inadequate prices, or to the oppression of Walker, or that he has done anything that at all savors of fraud or oppression. The mere non-performance of a beneficial parol agreement is not a fraud which will induce a court of equity to compel performance, or else every mere parol contract for the sale of a farm or a chattel worth thirty dollars, would be enforced in equity on the ground of fraud. Walker's case, as shown by his evidence, is the case of a naked parol contract, now become beneficial for him to have performed; this the Court of Appeals has declared he is not entitled to have enforced by a court of equity.

Hill has not pleaded, or set up the statute of frauds in his answer as a defence. But this is not necessary when the answer denies the existence of any contract or agreement, as the answer of Hill does most fully. The settled doctrine of the courts is, that if the answer admits a contract, with-

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out stating that it was not in writing and setting up the statute of frauds, the statute cannot be used as a defence. The admission will be held to be of a legal contract, that is, a written one, and no proof need be offered of it. But if the pleading or answer denies the existence of *any* agreement, the plaintiff will be obliged to prove one; and he must prove a legal agreement, which, in cases within the statute of frauds, is a written one. *Browne on Stat. of Frauds*, § 511; *Buttemere v. Hayes*, 5 *M. & W.* 456; *Johnson v. Dodgson*, 2 *Ibid.* 653; *Leaf v. Tuton*, 10 *Ibid.* 393; *Eastwood v. Kenyon*, 11 *Ad. & Ell.* 438; *Cozine v. Graham*, 2 *Paige*, 181; *Ontario Bank v. Root*, 3 *Ibid.*, 478; *Vaupell v. Woodward*, 2 *Sandf. Ch.* 143.

And, on the other hand, if the agreement to buy and hold in trust for Walker had been clearly proved, I am satisfied, from the allegations in the bill and the evidence of Walker and of Cutler, his attorney, that the object of Walker in having his property sold, and procuring Hill to purchase it, was to hinder and delay his creditors, and have it secured for himself against their claims. Walker states his embarrassments by debts contracted as surety, in his bill, preparatory to stating the confession of judgments to Hill, and his arrangements with him about the purchases; and in his evidence, he says that the object of the sale of 1862 was to place his property in safe hands, so that he might go away and do his government business like a true patriot, and that his property might not be sacrificed by any thing that might occur in his absence.

Mr. Cutler says, as to the sale of 1862, "my impression is, that there were these subsequent judgments, and it became necessary to have the title of this personal property out of Mr. Walker." "It was the intention of that sale to vest the title in Mr. Hill, so that it could not be reached by other executions." If this was the object of making the sale, which was not necessary for the security of Hill, before effected by his levies, and the sale of property far exceeding in value the amount of his claims, was made to

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effect that object, with the understanding that Hill should hold for Walker, it is a clear case of fraud against creditors and Walker can have no relief in this court.

On the argument it was contended that the delivery of the sheriff's deed on the foreclosure sale, after the sheriff was out of office, and at a place out of the state, and after the lapse of so long a time after the sale that the sale should be presumed to be abandoned, made the delivery illegal and void; and that the sale of the personal property without bill of sale, and without actual payment or delivery, rendered the sale of the personal property void.

These issues are not raised by the bill; that states the sale of the personal property, and the sale and conveyance of the real property by the sheriff, as actual existing sale and conveyances, and asks relief against them, by declaring the property so conveyed to be held in trust. If these were proper grounds for relief in equity, there are no facts stated in the bill on which such relief could be founded. There is no specific prayer for such relief; the only prayer besides the prayer for injunction and general relief is, that Hill and McAlpine may be declared to hold the property in trust for the complainant. Relief can be given under the general prayer, only when such relief is warranted by facts positively and clearly set forth in the bill. No facts stated in the bill, if the bill was expressly admitted to be true in all things, would warrant this relief. This is conclusive against these matters.

The view I have taken of the case will make it unnecessary for me to consider whether McAlpine, who was a *bona fide* purchaser for value, had sufficient notice of Walker's claim to put him on inquiry as to it, or can in any way be affected by the trust for him.

The bill must be dismissed with costs as to all the defendants.

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THE WEST JERSEY RAILROAD COMPANY vs. THOMAS and others.

1. The question whether an award is excessive or unjust cannot be considered in a court of equity, nor its merits reviewed. But where the alleged errors are of a sort sufficient to set aside the award, this court will regard them, so that a determination apparently excessive may be reviewed.

2. This court has jurisdiction over awards, but it will not exercise it in case of awards which, by agreement, are made rules of court. The court in which the rule is entered has that power and must exercise it.

3. No court will review and correct an award; the only power is to set it aside for corruption, or misconduct in the arbitrators, or a plain mistake of law or fact. And if arbitrators decide against law, not by mistake, but of purpose, with the intention of making a just award, when the strict principles of law seem to them to work injustice, their award will not be disturbed.

4. If the arbitrators proceed without the knowledge of either party, and without giving him an opportunity to be heard, or if they decide without any evidence, it is such misconduct as will set aside their award.

5. When a new arbitrator is chosen by the original arbitrators, either party has the right to adduce additional testimony and additional arguments. And when either party has not only not waived such right, but before the award was made, presented his protest to the arbitrators as soon as could reasonably be done, and served an injunction upon them to restrain them from proceeding, and the arbitrators shut him out from this right and make their award in the face of the protest and injunction, it is such misconduct as will set aside the award.

6 An injunction will not be dissolved for new matter in avoidance alleged in the answer, and not responsive to the bill.

Argued on motion to dissolve injunction, upon bill and answer.

Mr. P. L. Voorhees and *Mr. Theodore Cuyler*, (of Philadelphia), in support of the motion.

Mr. Browning and *Mr. Williamson*, contra.

THE CHANCELLOR.

By an award made between the parties on the 29th of June, 1869, the complainants were directed to pay the de-

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fendants \$159,437, and R. D. Wood to pay to them a fund of several thousand dollars, designated the renewal fund, which he held in trust for the parties. On this award the defendants, one of whom resides in Pennsylvania, have brought a suit at law in that state. The injunction is to restrain that suit.

The Millville and Glassboro' Railroad Company, in August, 1863, leased their railroad, of about twenty-three miles in length, between Milville and Glassboro' in the county of Cumberland, to the defendants for twenty years, or until the death of either of the defendants, if that occurred within that term. The defendants were bound to keep and deliver up the road and rolling stock in as good order as they were; and were to place in the hands of a trustee \$10,000 yearly, as a renewal fund, or a guaranty for the renewal or permanent repairs of the road and equipments, and to keep the buildings and rolling stock insured. They were to pay to the company as rent, one-half of the gross receipts of the road.

The lease provided that the lessors might at any time, upon three months' notice to the lessees, or either of them, put an end to the lease. In such cases, if desired by the lessees, the parties were to choose two persons to appraise the value of the contract to the lessees, and their loss and damage by such termination.

On the 1st day of April, 1868, the Milville and Glassboro' Railroad Company gave the notice required to terminate the lease, and on the same day, by authority of an act of the legislature, assigned their property and franchises to the complainants and became consolidated with them.

Disputes arose between the complainants and defendants, the former claiming damages because the road and rolling stock had not been kept in repair as required by the lease, and the latter claiming that the value of the lease to them and their damages by the termination of it were large, greater than the damages by non-repair of the road, and

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that the renewal fund in the hands of Wood belonged to them.

The parties, by written articles under seal, dated December 21st, 1868, submitted these controversies, and all others that had arisen or might arise between them, to the award of H. F. Kenney and M. Baird, of Philadelphia; the award to be made, signed, and ready for delivery by the first day of July then next. It was provided, that if these arbitrators could not agree they might select a third person as umpire, who, as third arbitrator, should join them, and that these three, or any two of them, should have power to determine the matters in difference by an award, ready for delivery by the day fixed.

The arbitrators met, and in presence of the parties proceeded with the hearing. By consent, the evidence of the witnesses was reduced to writing by a stenographer, which with the documentary evidence was left with the arbitrators; and by consent, the cause was argued by the written or printed briefs of counsel left with the arbitrators. The arbitrators failed to agree, and on the 16th of June, chose R. A. Wilder, of Pennsylvania, as the umpire or third arbitrator. Wilder, after some conversation with Kenney and Baird and examining some of the evidence, on the 26th of June took the oath required by law before a master of this court at Camden, and on the 28th of June met with the other arbitrators at the office of Kenney, in Philadelphia, and there proceeded to consider the matter upon the evidence and the briefs of counsel submitted on the first hearing. They met again on the 29th at the office of Baird, when Baird and Wilder agreed upon the award which they signed. Kenney dissented, but was present when they agreed upon it, and when a draft of it was before them; he did not meet with them on the 30th, when the engrossed copy or copies of this draft were signed by them. The arbitrators gave no notice to the complainants that they had disagreed or chosen a third arbitrator, or of their meeting with him to consider and decide the case. They intended

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to go on without the knowledge or presence of either party, and took this course for that purpose. The complainants or their counsel did not know of the intended meeting on the 28th until the evening of the 26th, and on the 29th served a protest against their proceeding on the arbitrators when convened, and on the same day caused to be served on them an injunction, issued out of one of the courts of Pennsylvania, restraining their proceedings. The two arbitrators, after consulting counsel as to the effect of the injunction, signed the award on the 30th.

The complainants allege that a large part of the documentary evidence was never shown to or read by Wilder. They contend that these documents which were offered and admitted in evidence on their part, consisted of the annual report of numerous railroad companies in the United States, which show that it generally takes much more than fifty per cent. of the gross receipts of railroads to pay the expenses of running and keeping them in repair, and would, if read by Wilder, have shown to him that a lease like this reserving fifty per cent. of the gross receipts as rent, could be of no value, but must be a loss to the lessees.

The question whether this award was excessive or unjust cannot be considered here; its merits cannot be reviewed. But this view of the case may show that this court ought not to disregard any errors of the sort that are sufficient to set aside the award, so that a determination apparently excessive may be reviewed.

The statement of the bill that this evidence was not shown to Wilder, or considered by him, is not verified by the oath of any one who had knowledge of the fact. It is denied in the answer in the same way, and not very directly, but still it is denied, and I do not feel inclined to dissolve the injunction on that ground.

This court has jurisdiction over awards; the jurisdiction is ancient and well established. It will not exercise it in case of awards which, by agreement, are made rules of any court. The court in which the rule is entered has that power, and

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must exercise it. But no court will review and correct an award; the only power is to set it aside for corruption, or misconduct in the arbitrators, or a plain mistake of law or fact. And if arbitrators decide against law, not by mistake, but of purpose, with the intention of making a just award, when the strict principles of law seem to them to work injustice, their award will not be disturbed.

In this case there is no pretence of corruption or mistake, but only of misconduct. The misconduct alleged is, that the original arbitrators did not give notice to the complainants that they could not agree and had chosen a third arbitrator, or of their time and place of meeting, so that they could appear and produce evidence and be heard by counsel.

It is undoubtedly such misconduct of arbitrators as will set aside their award, if they proceed without the knowledge of the party, and without giving him an opportunity to be heard, or if they decide without any evidence. But here the parties had been fully heard by counsel, and upon full proof before the original arbitrators, and the same evidence and written arguments had, by the consent of the complainants, been laid before the third arbitrator. The answer so expressly states, and in this respect it is responsive to the bill, which charges that no such consent was given in any way.

But when a new arbitrator was chosen, the complainants had the right to adduce additional testimony and additional arguments. A knowledge of the difficulties that prevented the agreement, or even of a difference of character or intelligence in the new arbitrator, might make such course very desirable. And it was as much misconduct in the arbitrators to shut them out from this right, as it would have been to proceed in the first place without any hearing.

I am aware that the English courts have held that arbitrators may state the case to an umpire chosen by them, and that if the parties do not request to be heard anew the award will not be disturbed. *Hall v. Lawrence*, 4 T.

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R. 589; *Tunno v. Bird*, 5 *B. & Ad.* 488, are such cases. The first seems, in the meagre report we have of it, to lay down this doctrine without qualification. In *Tunno v. Bird*, Lord Denman puts it on the ground, that the party knew that the umpire was proceeding to decide on the former depositions, and permitted him to go on, taking his chance of the award, and that it was too late to object afterwards; he should have applied to be heard. *Russell on Arbitration* 231, puts the decision of both cases on this ground.

In *Salkeld v. Slater*, 12 *Ad. & Ell.* 767, all three judges concur that it is the duty of the umpire to hear the evidence anew and not receive it from the arbitrators, unless it is clearly waived by the agreement or conduct of the parties. The same principle applies to the right to produce new evidence and to be heard by counsel.

In this case there was no waiver by the conduct of the complainants; after they heard of the intention to proceed without the presence or knowledge of the parties, as soon as it could reasonably be done they presented their protest, and sued out and served an injunction; both were done before the award. There was no acquiescence. If such agreement was entered into as stated in the answer, that the arbitrators, when the third was chosen, should proceed on the evidence and arguments before produced, and the party should not have notice or be heard anew, it might obviate the difficulty. But so far as the last part of this allegation is concerned it is new matter and not responsive to the bill; and it is the established rule in this court that an injunction will not be dissolved for new matter in avoidance alleged in the answer, not responsive to the bill.

It was so held by Chancellor Williamson in *The Morris Canal and Banking Company v. Jersey City*, 1 *Beas.* 227, and in *The Society v. Butler*, *Ibid.* 264; and this principle was approved by the Court of Appeals in reviewing that case, *Ibid.* 506; by the same Chancellor again in *Green v. Pallas*, *Ibid.* 267; also, by Chancellor Green in *The Society v. Low*, 2 *C. E. Green* 19, and in *Huffman v. Hum-*

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mer, *Ibid.* 263. The same doctrine is held in *Minturn v. Seymour*, 4 *J. C. R.* 499, and stated as law, in *Hilliard on Injunctions* 55. The counsel of the complainants deny the truth of this allegation, and they are entitled to be heard by proof.

The conclusion at which I have arrived on this point, renders it unnecessary to examine the other questions on which the complainants place their right to maintain the injunction.

It is, besides, one of those cases which appeals strongly to the discretion of the court to retain the injunction until the hearing. The denials of the other grounds may then be disproved. If dissolved, and the defendants should by proceeding at law receive the award, the complainants might be without remedy, even if on the final hearing the award should be set aside.

Motion to dissolve refused.

GREEN vs. WILSON.

1. The fact that the validity of a patent is, or may be involved in a suit for the violation of a covenant under seal, is not a ground for demurrer; the state courts have jurisdiction. When such suit is between citizens of the same state, the Federal courts have no jurisdiction.

2. A notice given under a contract must be construed according to the intention of the contract. Though the notice is in terms to revoke a contract, but the evident object of it is to revoke only an authority or license under the contract, the authority or license only will be thereby revoked.

The argument in this case was upon a demurrer to the bill, and on a motion to dissolve the injunction.

Mr. Dutcher, in support of the demurrer and motion.

The bill filed in this cause states the complainant's patent, what he claims under the patent, and his agreement with the defendant for the use of it. The complainant charges that

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defendant has driven a large number of wells, that he has not paid the royalty due to complainant, and alleges a revocation of the license, in accordance with the provisions therein contained. The complainant also charges, that notwithstanding said revocation, the defendant still continues to sink non-flowing wells in the territory covered by the license. It is also charged *on information and belief* that the defendant is irresponsible, &c., and has not property from which complainant *can collect sufficient to compensate him for the failure of the said Wilson to carry out and perform his said agreements, &c.*; it does not show inability to pay royalty. The bill concludes with the prayer for relief and injunction; and by the amendment asks that the defendant may be decreed to account for all royalties due from him to complainant, and all moneys due under the agreement.

Considering this bill as if demurred to for want of jurisdiction, can it be sustained in this court?

The complainant insists that the object of the suit is to enforce a sealed agreement, in other words, that it is a bill for specific performance. The defendant contends that it amounts to a bill for infringement of a patent. Although it is not filed as a bill for infringement, yet such defences can be made to the bill as will raise questions that may compel the court to decide upon the *validity* and *force* of complainant's letters patent. It may open all the questions that can be raised on the novelty of the invention, the legality of the letters patent, and if the defendant is sinking wells, whether the process used by him is the same, or equivalent to complainant's patent, or whether it is under another patent, and if so, whether such other patent is valid, or is an infringement of complainant's patent; in short, all the questions that can be raised in any patent case may come up in this.

First. We will consider the case as if the agreement was still in force.

If the suit was brought simply to recover the amount of royalty due to the patentee under the agreement, it would

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be cognizable in a state court. But in that case it should be an action at law, and would be one where the plaintiff would have a complete remedy at law. Here the complainant goes farther; he sets up his rights under his patent, and alleges that the defendant is using it without authority, without paying the royalty agreed upon, and asks an injunction to restrain him. This makes the case parallel with the case of *Brooks v. Stolley*, 3 *McLean* 523.

The complainant's right to an injunction and for the relief he asks depends, not upon the contract, but upon his rights under the patent and assignment. The complainant insists that the defendant is estopped by his agreement from questioning the complainant's patents. Even if the agreement was in force and unrevoked, the defendant would not be estopped from alleging fraud, and showing that he was deceived by the complainant, and fraudulently induced to enter into the agreement.

We insist that if the agreement was in full force and unrevoked, the case comes within the ruling in *Brooks v. Stolley*; *Curtis on Patents*, § 496, and cases cited.

Secondly. How are the complainant's rights affected by the revocation of the agreement?

The complainant alleges in his bill, and shows by affidavit and copy of notice annexed, that he revoked the agreement May 10th, 1870. This was not merely a revocation of authority to use the patent, but a complete revocation, as the complainant alleges, of the agreement. Yet the complainant complains that one covenant in the agreement, on the part of the defendant, still exists, viz. the covenant to refrain from driving and constructing said wells after the complainant should revoke the authority given by the contract.

If the agreement was existing, the defendant would be precluded from sinking said wells by virtue of the contract; now he is prohibited by law, as if no contract had ever been made.

If one party to a contract revoke or rescind the agree-

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ment, it must be a "rescission *in toto* and the parties put *in statu quo*." 2 *Parsons on Con.* 190 to 194 (4th ed —); see 192, note O, and cases cited; *Chitty on Con.* 641.

The complainant could not revoke or rescind the contract and leave the defendant's covenants binding and in force. The revocation recalls, annuls, and puts an end to the agreement; it rescinds it *in toto*. There is no longer any agreement on the part of defendant. Both parties are placed back where they were before the agreement was made. *The complainant did not annul a part of it and leave the other part in force.* He cannot destroy the agreement and then claim that it still exists on the part of the defendant. If he had simply notified the defendant not to drive any more wells under his patent, the case might be different. But instead of this he destroys and makes void the whole contract. The defendant is no longer bound by anything contained in the agreement, because he has no agreement existing. It is like an act of the legislature revoking the charter of a corporation (where they have the power), or a principal revoking the authority of an agent. The company is released from all duties and liabilities under the charter, and the agent from all duty to his principal.

If the defendant in this case has not paid the royalties claimed by the complainant under the agreement, the complainant may bring an action at law to recover them, but he has not shown sufficient ground for the interference of a court of equity, even for that purpose.

The agreement being revoked, being annulled, at an end, and no longer existing or binding on either party, if the defendant uses the plaintiff's patent, he is an infringer, and liable as such, for which he may be held to answer in the United States court, and not elsewhere. This is the direct question that comes up in the case. The question of infringement is not a collateral one, but is the real question, and it is for infringement that an injunction is asked. The same comparison and designation of patents may take place in this case, as in any other case for infringement. There being no

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agreement existing between the parties, the complainant's right to relief by injunction in this court ceases.

Thirdly. This case is different from those cited by complainant's counsel; in all those cases where it has been held that the state courts had jurisdiction, there was an existing contract, and the suits were brought to recover the rights due under those agreements.

Fourthly. The complainant has not shown sufficient grounds for an injunction. He alleges in his bill, that the defendant continues to drive wells since the revocation, and cause them to be driven, *but he does not show or charge that they are driven under the complainant's patent, or in a manner that is equivalent thereto.*

It certainly cannot be insisted that the defendant has no right to sink or drive wells; all that can be claimed is, that he has no right to do so under the plaintiff's patent, or by a mechanical equivalent not protected by a prior patent.

The injunction restrains the defendant from using the complainant's patent, but the bill does not allege that he is using it. The injunction is not supported by the bill, and even if the court had jurisdiction, should be dissolved.

W. H. Vredenburg, contra.

Has this court the jurisdictional power to enforce the agreement upon which the suit is founded?

The prayer of the bill is to enjoin the defendant from driving certain wells in specified districts in this state, and for an account of royalties due complainant for wells already driven by defendant under said agreement.

The contention of the defendant is, that this court has no jurisdiction, because the case presented by the bill is one as to the *infringement of a patent.*

We deny this, and say that no such case is presented by the bill. The bill shows that the object of the suit is to enforce the terms of an agreement (a copy of which appears in the bill) in which the defendant has agreed for a valuable

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consideration, under hand and seal, to pay certain amounts to complainant, and to discontinue certain acts.

We contend that no question of the infringement of a patent *can* arise in this suit, because the defendant has bound himself by his agreement, that he would "at all times recognize the binding and valid force and authority of said letters patent." That the defendant is thus estopped at the outset, from denying our right and title to our patent, just as a tenant is estopped from denying the title of his landlord to the rented premises. That the only question the defendant can raise under this pleading, is the question whether he is driving exactly such wells as are secured to complainant by his patent. That this can only be a question of comparison, of designation, and identification.

The question here must be whether he, defendant, is violating the agreement by driving just such wells as are therein contemplated, and which he has agreed not to do. If so, it may be true that he is also infringing on our patent, and making himself liable to proceedings under the patent law; but for that infringement we do not now complain in this court.

But suppose we are wrong in this view, and that the question as to the infringement or validity of our patent may arise *collaterally* in this suit, we contend that this court has jurisdiction.

It is true, that a state court has not jurisdiction in a *direct* suit for the infringement of a patent, but it has where the question of infringement comes up collaterally.

For instance, in a suit upon a note in a state tribunal, given on the sale of a patent for a machine, it is competent for defendant to show that the consideration for the note failed, and that the patent is void on the ground that the machine (for making and vending of which the patent was granted) is not a *new* invention, or that the patent was defective in some other essential particular. *Cross v. Huntly*, 13 Wend. 385; *Head v. Stevens*, 19 Wend. 411; *Rich. v. Atwater*, 16 Conn. 409, 414.

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The cases cited by defendant's counsel do not affect this position. In the case of *Dudley v. Mayhew*, the court held that jurisdiction of patent cases could not be given to a state court by the mere consent or stipulation of parties. In other words, that consent or stipulation of parties could not of itself give jurisdiction to a tribunal where the law did not vest it. But where, as in this case, the basis or foundation of the suit is within the cognizance of this court, to wit, the enforcement of rights under an agreement, it cannot be maintained that this court cannot try the suit because possibly *incidental* or *collateral* questions may arise that, if *independent*, would fall within the jurisdiction of another court.

If this court has *not* jurisdiction, then it is because the United States courts have *exclusive* jurisdiction of matters involving such collateral questions. But it has been held in a variety of cases, "that jurisdiction is not conferred" upon the United States courts by such a subject matter as forms the basis of the present suit. *Wilson v. Sandford*, 10 How. 99; *Goodyear v. The India Rubber Co.*, 4 Blatchf. C. C. R. 63; *Messerole v. Union Paper Collar Co.*, (decided March 27th, 1869, in United States District Court), opinion of Blatchford, J.

But the case of *Rich v. Atwater*, 16 Conn. 409, seems to me to be precisely similar to the present case, and to settle the point under discussion *viz.* that the state courts *have jurisdiction* to try the question of the validity or infringement of a patent where such questions come collaterally before them. In that case, the plaintiff owned a patent for a machine which the defendant was infringing. The defendant, by a covenant, agreed not to use the infringing machine any longer, but nevertheless went on using it, and the plaintiff brought a suit founded on the agreement for an account and an injunction. The defendant offered to prove that the patent was invalid for want of novelty. The plaintiff objected to the evidence, and the court, in full bench, held the evidence admissible.

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The defendant next contends that the revocation of the agreement by the complainant, as stated in the bill, terminated and put an end to the agreement for all purposes; and that after that both parties stand as if no such agreement had been ever made between them, and that, therefore, the court has no jurisdiction.

But we reply to that, that the defendant is bound to respect his own covenant. That in that agreement he made the following covenant: "And I hereby, for value received and in consideration thereof, agree to discontinue and refrain from driving and constructing the said wells, from and after the revocation of this authority by the said Green according to the terms of the reservation of the right to revoke the same by him, hereinafter mentioned."

If this covenant is binding upon defendant, his violation of it would give us the right to the relief prayed for out of this court. If there was a consideration for that covenant, it is certainly binding upon the defendant. The law will *infer* a consideration from the *language* of the covenant itself.

Again: If the defendant denies that there was a consideration for that covenant, he must establish his denial by proof, and that raises a question of fact, not of law, and cannot now be considered.

Again: We say there was a consideration to be inferred from the agreement itself. That the complainant entered into this agreement with defendant, and granted him this privilege of driving wells until said revocation, as much upon the *consideration* of defendant's covenant not to drive said wells *after* revocation as upon the consideration of his covenant to pay royalties of \$5 *before* revocation. That defendant made the royalty lower and easier on account of defendant's covenant not to drive after revocation. That it would be most unjust to allow defendant to learn complainant's *art* of digging wells and get all the benefit of his agreement, and then, by his own wilful act in refusing to pay royalties, enable himself to break the agreement and defeat the com-

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plainant altogether. That in this way the law would allow defendant to take advantage of his own wrong.

But if any branch of this bill can confer jurisdiction to this court it will be sufficient to overrule demurrer. The complainant's right to an account from defendant for past royalties due while the agreement was unrevoked between them, must certainly appertain to the jurisdiction of this court. This right exists by virtue of the said agreement and comes within the principle of the cases already cited.

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The complainant, claiming as patentee the exclusive right to sink wells in the manner described in his patent, authorized the defendant to sink wells in a certain district in this state, including the county of Union, in that manner; reserving to himself the power to revoke the license at his pleasure. The defendant agreed to pay a certain royalty on every well that he sunk in that manner, to recognize the validity of the patent, to pay the royalties agreed upon, and upon the revocation of the license to refrain from constructing such wells. The agreement was by mutual covenants under seal.

The defendant sunk several wells in the manner described, but neglected to pay the royalty. The complainant thereupon revoked the agreement, but the defendant still went on sinking wells.

The bill was for an account of the royalties on the wells sunk before the revocation, and to restrain the construction of any more wells of the kind described in the letters patent.

The defendant insists that this court has no jurisdiction, because the suit involves the validity of the patent, and the jurisdiction in such case is exclusively in the Federal courts,

This suit is not upon the patent, or for an infringement of it, but is upon the covenant under seal, and is for a violation of that, and to restrain a further violation of it. The validity of the patent may come in question, if the defen-

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dant seeks to avoid the agreement for fraud or want of consideration. But in such cases it is held that the jurisdiction is in the state courts, and that when the suit is between citizens of the same state the Federal courts have no jurisdiction.

The defendant claims that the *contract* is revoked, and not merely the *license*; and the contract being revoked the complainant can have no relief upon it, but only upon his patent. The bill charges that the complainant revoked the contract, and the written notice served on the defendant stated that the contract was thereby revoked. But the evident object of this notice was to revoke only the authority or license. The contract expressly reserves the right to revoke the authority, not rescind or revoke the contract. The word revoke is not applicable to a mutual contract like this. Rescinding or annulling it, is a different matter from revocation. The terms of the notice must be construed according to the intention of the contract under which the notice was given; and the allegation of the bill must be construed to conform to that meaning. The complainant could not revoke the covenants of the defendant; he might discharge the defendant from them. This notice cannot be construed into a discharge.

But the allegations of the bill are insufficient to sustain the injunction. It is nowhere alleged that after the revocation the defendant had sunk wells according to the plan patented, or that he threatened or intended to sink such wells; but only that he continues to drive and construct a large number of non-flowing wells and other wells within the district. This he had a perfect right to do, provided they were not of the kind, or sunk in the manner designated in the agreement. For an injunction it is not only necessary to aver a right, but also that the defendant has violated or intends to violate it.

The demurrer must be overruled and the injunction dissolved.

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**IN THE MATTER OF THE APPLICATION FOR SALE OF LANDS OF
DENMAN F. HEATON AND EUGENE HEATON, INFANTS.**

1. Upon a reference to examine and report whether the interest of infants ~~require~~ and will be promoted by a sale of their lands, the master must ~~report~~ his own opinion, formed from facts, not that of others, nor an ~~opinion~~ founded upon that of others without facts. Mere opinion of witnesses is no evidence.

2. The testimony of the father and mother, owning a life estate in the premises, that the interest of the infants would be promoted by a sale, when they would be clearly benefited by the sale at the expense of the infants, should not be acted on and hardly received.

3. It is not a sufficient reason for the sale of infants' reversionary estate in lands, that the property is so much out of repair that it would now cost more to put it in tenantable repair than the income would justify, when the property has been in the actual possession of the life tenants. If they have suffered it to get out of repair, they are bound to put it in as good repair as it was when they entered upon it.

4. Upon an application for the sale of infants' reversion in land, the only question is, will the property bring as much now as it will at the death of the life tenant? If it will not, it is not for the interest of the infants to sell, if the life tenant is to receive a share of the proceeds, or of the income from them, according to the rules of this court.

On motion for order to sell infants' reversionary interest in lands, upon report of the master.

Mr. J. W. Taylor, for application.

THE CHANCELLOR.

The master reports that the interest of the infants ~~requires~~ and will be promoted by a sale of the lands in question, but that the sale should not be at a price below \$6000 for the estate of the infants. That the premises are greatly in need of repair, and are deteriorating for the want thereof; and that an investment of the proceeds will be better than the retaining the property for future improvement in value.

This may be so, but I have before me all the evidence

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taken in the case, including the exhibits, and have read them carefully, and I find in them nothing from which I can arrive at that conclusion, or from which the master could have arrived at it. The land is a tract of 35 acres, with a dwelling-house and other improvements, situate in Essex county, I presume in Springfield township, and is upon the road from Springfield to Burnt Mills. No evidence is given of its value, or the value of like lands adjacent to it. It does appear that the adjoining lot was once sold for a *large* price. This is very indefinite. It may have been for \$2000 per acre, which in some parts of that township would not be a large price, or for \$100 per acre, which in other parts would be a large price. There is in this case nothing from which I can form any opinion of the value of this land, between these prices or beyond them. I cannot, therefore, adjudge that the interest of the infants is not worth over \$6000, or order a sale at that price. The master had no other evidence before him, and should not, from this, have made a report recommending the sale.

The witnesses give their opinion that the interest of the infants would be promoted by the sale. The master has evidently made the mistake of considering that the question referred to him was to be decided by the opinion of witnesses, and not by his own, from the facts. The Chancellor must act in this case as in all cases, upon his own opinion, formed from the facts; and the master, to whom it is referred to examine and report, must report his own opinion, not the opinion of others, or an opinion founded upon that of others. In these sales of infants' lands, as in all cases, mere opinion of a witness is no evidence; they must be determined by the opinion of the court, on facts. The witnesses in this case, too, are chiefly the father and mother of the infants, who own a life estate, and who would be clearly benefited by the sale at the expense of the infants. The opinion of either of them ought hardly to have been received, certainly not acted on. The only other opinion is

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That of a son of the mother, who, though twenty-one, must **be** presumed to be still under her influence.

There is no ground, even on these opinions, for directing **a** sale at \$6000; there is nothing from which I can infer **that** the property, or their estate in it, is not worth ten times **that** sum.

The reasons assigned for the sale are, first, that the property has been suffered to go out of repair, so that it would now cost more to put it in tenantable repair than the income would justify. The petitioner and his wife, the life tenant, have been in possession of this property about ten years. If it has been suffered to go out of repair during that time, they are bound to put it in good repair, or as good as it was when they entered upon it. A life tenant is bound not to commit or permit waste; he is bound to make the repairs needed by the natural and usual wear and tear; to keep the premises in their original condition; to rebuild fences; to repaint the house, and to renew the roof and other parts of a house when they decay, so that he may hand it over to the remainderman as good as at the commencement of the life estate. Rule 130, relating to infants' sales, is founded upon this principle. It is hard to conceive that the master was not familiar with the principle, and yet the report is made in entire disregard of it.

The second reason is, that the interest from the proceeds of the sale would be greater than any income to be derived from the farm, above repairs and taxes. The facts show, if they could be sold for \$6000, that this is so. But this is no benefit to the infants, but to the life tenant only. The net proceeds of the property for the next ten years may be nothing. If their mother continues to live, this will be no loss to the infants, but only to her. It can be no reason for a sale until her death.

The only question in the case is, will this property bring as much now as it will at the death of the life tenant, ten or twenty years hence? If it will not, it is not for the interest of the infants to sell, that is, if the life tenant is to

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receive a share of the proceeds, or of the income from them according to the rules of this court.

There is nothing in the evidence that shows the location or vicinage of this property, or whether any, or what improvement in value can be expected in the future. The master had nothing on which to base his report as to this matter. And this court ought not to act in this most important matter of disposing of infants' estates, upon a master's report, made without regard to either law or evidence or to give such report any weight.

And it is very questionable, as the statute makes the infants in these applications for sales the wards of this court whether it is not the duty of the court in this case to appoint some special guardian to see that the life tenant performs her legal duty of putting and keeping these premises in repair; which both she and her husband testify that they have not done and do not intend to do.

The master reports that \$6000 is a proper price at which to sell the estate of the infants, but the report as to the release of the life estate makes it seem that he intended this sum to include the interest of the life tenant; in this respect it is so uncertain that it could not be acted upon.

The interest of the infants in this property is uncertain and such as it is hard to suppose that any person of ordinary prudence would purchase, unless at a very low price. The property was devised to their mother for life, and after her death to be equally divided among her heirs. The Court of Errors in *Demarest v. Hopper*, 2 Zab. 599, held that such devise gave to the children a vested estate. This decision, which surprised such of the profession as were familiar with the common law doctrine of contingent remainders, has, by acquiescence, become the settled law of the state; and it is wise legislation, at least, if it did change the old rules. But by it the estate of the children will open and let in any child of the mother yet to be born (and her age or condition nowhere appears), and if either of them die before the mother, no conveyance by such child, or by

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order of this court, would convey any estate. If all three should so die the purchaser would take nothing at all. In such case it would appear improper for this court to offer for sale the property of infants under circumstances that must cause a great sacrifice.

Yet if a purchaser is found willing to buy at a price which would be the value of the property, was there no risk or contingency, it might be the duty of the court to order the sale. But with a life whose probable duration may be twenty years, it is so difficult to judge what will be the value of the fee at the termination of that life, that it is almost impossible to estimate its present value. If at the end of twenty years this property would be of twice its present market value, which is not an improbable or extravagant estimate, what the infants should receive is double what it should be calculated on its present value; and there is little property in the flourishing and prosperous parts of the state that has not doubled in value in the last twenty years, and that will not have the like increase in the next twenty. The advantage of present enjoyment belongs to the life tenant; future increase in value to the remainderman; the value of the fee is composed of both. By a sale, the remainderman loses this advantage and shares it with the life tenant.

If it is deemed advisable to press this application further, it may be referred to another special master to inquire and report upon the facts, to be ascertained through witnesses. The sale will not be ordered upon the present report.

 McCLURG vs. TERRY.

1. A marriage ceremony, though actually and legally performed, when it was in jest, and not intended to be a contract of marriage, and it was so understood at the time by both parties, and is so considered and treated by

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There is not a contract of marriage. Intention is necessary, as in every other contract.

2. The Court of Chancery has the power to declare a marriage void, when performed in jest and where it was not intended to be a contract of marriage.

3. The legislative acts and the constitutional provision bearing on the subject, examined.

Argued on final hearing, upon pleadings and proofs.

Mr. A. K. Brown, for complainant.

Mr. A. S. Jackson, for defendant.

THE CHANCELLOR.

The complainant seeks to have the ceremony of marriage performed between herself and the defendant, in November, 1869, declared to be a nullity. The ground on which she asks this decree is, that although the ceremony was actually performed, and by a justice of the peace of the county, it was only in jest, and not intended to be a contract of marriage, and that it was so understood at the time by both parties, and the other persons present; and that both parties have ever since so considered and treated it, and have never lived together, or acted towards each other as man and wife. The bill and answer both state these as the facts of the case, and that neither party intended it as a marriage, or was willing to take the other as husband or wife. These statements are corroborated by the witnesses present. The complainant is an infant of nineteen years, and had returned late in the evening to Jersey City, from an excursion with the defendant and a number of young friends, among whom was a justice of the peace, and all being in good spirits, excited by the excursion, she in jest challenged the defendant to be married to her on the spot, he in the same spirit accepted the challenge, and the justice at their request, performed the ceremony, they making the proper responses. The ceremony was in the usual and proper form, the justice

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doubting whether it was in earnest or in jest. The defendant escorted the complainant to her home, and left her there as usual on occasions of such excursions; both acted and treated the matter as if no ceremony had taken place. After some time the friends of the complainant having heard of the ceremony, and that it had been formally and properly performed before the proper magistrate, raised the question and entertained doubts whether it was not a legal marriage; and the justice meditated returning a certificate of the marriage to be recorded before the proper officer. The bill seeks to have the marriage declared a nullity, and to restrain the justice from certifying it for record.

Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But these words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage. On this part of the case I have no difficulty.

The question whether this court has jurisdiction in such cases, or similar cases, to decree a marriage to be a nullity, is not so free from doubt. The fact of marriage can be determined by any court where the question arises, from a justice's court in a suit for goods furnished to the wife, to this court on a question of alimony and the legality of marriage, and the question whether the ceremony was in jest or earnest, could in such cases be determined. But the finding would only bind the parties to that suit. Another suit tried the next day between other parties might reach a different result, and the judgment in the first suit could not be received even as *prima facie* evidence in the subsequent suit. It could not nullify the marriage relation.

But here the proceeding is *in rem*, strictly so called; it is upon the matter of the marriage, to determine simply

CHAPTER IV. — MARCERY.

It is not necessary to inquire whether a debt or a contract is a part of the marriage. It is a proceeding *in rem*, it is a proceeding against the parties to it: it is a proceeding against the Marriage itself is a proceeding against the parties man and woman. It is a proceeding against the marriage. The proceedings of the admiralty are proceedings against the property. The proceedings are bound by the rules of the court, and proceed- ings. In England, the court of marriage and divorce is a court of marriage. These courts have jurisdiction. Under the colonial system, with the power of the court of marriage and divorce. The first Constitution of the Ordinary, and the second Constitution of the Ordinary. But the existing act concerning the jurisdiction to the court of marriage and divorce is a administration and a proceeding out of the same, with the court of the Ordinary in New York. The jurisdiction in matrimonial causes, 143, gave to the Court of marriage and divorce, "by this act directed an act which authorizes a divorce without a formal ceremony like a proceeding by fraud or compulsion. When was adopted, the legislation of divorce, and declarin- A statute for that purpose

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operated in rem, and dissolved the relation. The Constitution took away that power and vested the chancery powers in the Chancellor. Among these powers was that of granting divorces as then established. A literal construction of these acts and constitutional provisions, would not seem to vest in this court the power of declaring marriages void, except in the cases specified, and yet a liberal construction, guided by what was evidently the design of these provisions, might extend the jurisdiction of this court to this class of cases. In every well ordered government it is proper that there should be some tribunal or power competent finally to determine the validity of so important a matter as marital relation, so that parties may know their obligations and rights, and that this should not be left to be determined differently by each court, where the question might incidentally arise. And when the power over this subject was taken from the legislature, it is fair to infer it was intended to be left with this court, upon which jurisdiction over most causes of divorce had been directly conferred.

In the state of New York, Chancellor Kent and Chancellor Sandford, both held, with statutes more restricted than that of New Jersey, that the power of declaring marriages void for fraud or force, was vested in the Court of Chancery. *Aymar v. Roff*, 3 J. C. R. 49; *Wightman v. Wightman*, 4 J. C. R. 343; *Ferlat v. Gojon*, 1 Hopk. 478.

And the Supreme Court of the state of Vermont, in *Clayton v. Field*, 13 Vt. 460, on an appeal from chancery, in a well considered opinion delivered by Chief Justice Williams, held that the courts of chancery of that state had the power, without any direct delegation of it for that purpose, to declare a marriage procured by fraud and force to be void.

I am satisfied that this court has the power, and that this is a proper case to declare this marriage a nullity.

Lewis v. Conover.

LEWIS vs. CONOVER.

When a mortgagee is made defendant to a suit for foreclosure, and the final decree in that suit gives such mortgagee his costs, he will not be required to cancel or release his mortgage before the costs are paid. The mortgage is merged in the decree, and such relief will not be granted until the decree is fully satisfied.

Quære. Whether, after such decree, a suit can be maintained in equity to compel the release or canceling of the mortgage.

This cause was argued upon bill, answer, replication, and proofs.

Mr. S. M. Dickinson, for complainant.

Mr. R. Allen, jun., for defendant.

THE CHANCELLOR.

The object of this suit is to compel the defendant to cancel or release a mortgage. The complainant contends that the mortgage is fully paid. The defendant contends that the mortgage is not quite paid, and that there is besides some costs due on a decree by which the premises were directed to be sold for its payment in a foreclosure suit.

In June, 1860, the defendant filed a bill to foreclose this mortgage; he neglected to proceed, and in 1869 this bill was dismissed; no costs on this dismissal can be recovered by the defendant. But in August, 1860, a prior mortgagee commenced a suit to foreclose, which proceeded to final decree. Conover, the defendant here, was made a defendant in that suit, and in it a final decree was had in May, 1861. This decree is in favor of the defendant, for the amount due on his mortgage, and costs to be taxed at \$23.18, which have never been paid. The receipts produced by the complainant, if sufficient to satisfy the mortgage debt and interest, clearly do not cover their costs; and two of these receipts are expressed to be on account of the mo—

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gage and *decree*. Besides this, it appears to me that the whole debt and interest is not paid. The letter of June 30th, 1866, agreeing to pay seven per cent. from that date, and the act of March 15th, of that year, entitled the defendant to interest at the rate of seven per cent. This would leave a small sum due on the mortgage. The mortgage is merged in the decree, and even if a suit can be maintained in equity to compel the release or canceling of a mortgage after such decree, no such relief will be granted until the decree is fully satisfied.

The bill must be dismissed.

LINN and others vs. WHEELER.

1. An injunction against a defendant to restrain him from receiving a sum of money in the hands of his attorney, or from permitting it to be paid to any one for him or on his behalf, will not be dissolved on motion of the attorney.

2. No one but a party to a suit can make any motion in it, except for the purpose of being made a party.

The bill in this case is filed by Edward N. Linn, Richard Philip, John G. Stanley, William B. Stanley and Alexander Philip, who together constitute the firm of R. Philip & Co., of Belleville, in the county of Essex, New Jersey, against Charles H. Wheeler and Charles H. Wheeler, junior, both of said township. It sets forth that on or about October 18th, 1869, they recovered judgment against Charles H. Wheeler for \$230.25, besides costs of suit. That on December 24th, 1869, they issued execution thereon, which was returned to January Term, "no goods or lands, etc." That the judgment has never been paid or satisfied, and that there is due upon it \$268.22, with interest. That Charles H. Wheeler, as the complainants have been in-

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formed and believe, about September 17th, 1869, entered into an agreement in writing with the Montclair Railway Company in the form of a proposal to do work, grading part of their road. That on or about September 10th, 1869, and after suit had been commenced by plaintiffs, Wheeler went to the office of the company, and in an interview with one H. H. Fuller, said that he desired that the words "and Son" should be affixed to his signature to the proposal, and representing that he desired that his son should be interested with him in the contract. That Fuller, acting for the company, assented thereto and permitted Wheeler to make the addition to his signature to the proposal. That complainants have been informed and believe that the work was thenceforth done under those proposals in the name of Wheeler and Son, but that Wheeler, after that alteration, continued to control the workmen and superintend the operations of the work as before. That they are informed and believe that a dispute arose between Wheeler and Son and the company, as to the amount of work done under the agreement, and as to the sum justly due to Wheeler and Son on account of the work. That thereupon Runyon and Leonard, as attorneys for Wheeler and Son, instituted for them a suit in the Supreme Court against the company, and recovered judgment for \$1961.50 besides costs, and thereupon a writ of execution was issued to the sheriff of Essex county. That on or about May 26th, 1870, complainants commenced "supplementary proceedings" under the act entitled "an act to prevent fraudulent trusts and assignments," against said Charles H. Wheeler, which have been proceeded in, and that witnesses have appeared before the commissioner and testified concerning the matters which formed the ground of the reference, but that the examination is not yet completed. That on proof of the facts and circumstances required by the act, made to the judge by the oath of John Ettenborough, an order was made that Charles H. Wheeler refrain from receiving the money, or any part thereof, either from the company or

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from Charles H. Wheeler, junior, or from any other person ;
and that Charles H. Wheeler, junior, should refrain from
paying the money or any part thereof to Charles H.
Wheeler, or any other person in his behalf, till further
order be made in the premises. That those orders were
dated June 6th, 1870, and were served upon Charles H.
Wheeler and Charles H. Wheeler, junior. That the com-
plainants have been informed and believe that subsequently
to issuing execution against the company and the making of
these orders, the company paid the sheriff of Essex the
amount of the judgment, \$1961.50, besides costs ; and that
the sheriff has paid the money over to Runyon and Leon-
ard, complainants' attorneys. That the complainants
greatly fear that Runyon and Leonard will pay over the
entire amount of those moneys to said Charles H. Wheeler,
junior, and that irreparable mischief will thereby be done
to the complainants. The complainants further show that
Charles H. Wheeler is entitled to the whole or a large
part of that money to his own use ; and that they are enti-
tled to have their judgment satisfied out of it. The bill
prays an injunction to restrain Charles H. Wheeler, junior,
from receiving the money in the hands of the attorneys, or
any part thereof, and to restrain Charles H. Wheeler and
Charles H. Wheeler, junior, their agents, attorneys, and ser-
vants, from permitting said moneys, or any part thereof, to
be transferred or paid to any person or persons in their be-
half until further order. An injunction issued pursuant to
the prayer of the bill.

The cause was argued on motion to dissolve or modify the
injunction.

Mr. T. Runyon and Mr. Leonard, in support of the motion.

The Wheelers are the only defendants to the bill. There
were, at the time of filing the bill and obtaining the injunc-
tion, other persons who, to the knowledge of the complain-
ants, claimed all the money in the hands of the attorney of
the plaintiffs in the railway suit, under and by virtue of an

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order (in effect an assignment,) given by the Wheelers to them, March 21st, 1870.

The parties referred to are the commercial firm of Bryant and Co., mentioned in the affidavit of Henry W. Morehouse, submitted on their behalf on the argument of this motion.

Although the complainants knew of this claim on the part of Bryant and Co., they did not make Bryant and Co., (the firm doing business in the city of Newark), parties to the suit. But it will be perceived that the effect of the injunction in restraining the attorneys, from "permitting the said moneys, or any part thereof, to be transferred to any person or persons, on behalf of the said Charles H. Wheeler, and Charles H. Wheeler, junior," is to prevent the payment of money to Bryant and Co.

Charles H. Wheeler and Charles H. Wheeler, junior, having neither of them any interest in the moneys in the hands of the attorneys, will not, of course, answer the bill of complaint.

Messrs. Bryant and Co., not being parties to the bill, cannot answer the same. They are therefore compelled to come into court and ask, upon their affidavit of the facts in the case, that the injunction may be so modified as to permit them to receive from the hands of the attorneys the money which is their due.

They have therefore prepared (and caused to be served on the 27th of August last, upon the complainants' solicitor) an affidavit setting forth the circumstances under which they ask the modification of the injunction. Those circumstances are briefly these: that on the 21st of March last, Charles H. Wheeler, junior, was indebted to the firm in a large sum of money, namely, \$1055.25 for groceries, feed, and grain, by the firm of Bryant and Co., furnished, sold, and provided to him before that, *and principally used by him in carrying on the work under the contract in the bill mentioned*; and being so indebted to the firm, and contemplating and *desiring further* credit for like supplies, *Charles H. Wheeler, junior, and his father, Charles H. Wheeler*, on the depo-

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nents asking for pay (the deponent being one of the firm) for the bill then accrued, proposed to give to the firm an order on the claim against the Montclair Railway Company, in the bill mentioned, to secure to Bryant and Co., not only the money due to them at that time, (\$1055.25), but such further sum as should accrue and become due to them from Charles H. Wheeler, junior, whether for groceries, feed, grain, cash advanced or otherwise, to which proposition Bryant and Co. then assented; and on that day, March 21st, 1870, they received from the Wheelers an order of that date on Runyon and Leonard, as attorneys in the suit against the railway company, for so much of the moneys coming to the Wheelers from the railway company as would be sufficient to cover the account of Bryant and Co., then existing against Charles H. Wheeler, junior, and whatever further indebtedness might be contracted as above mentioned by Charles H. Wheeler, junior, with Bryant and Co., for groceries, feed, grain, or other account up to the time of the receipt of the moneys by Bryant and Co., under the order. That the order was in writing, and is now in the possession of Bryant and Co. That after the making and receipt of the order, Bryant and Co. presented it to Runyon and Leonard on the same day, March 21st, 1870, in order that it might be by the attorneys accepted so far as usual in such cases, and on presenting the order to the attorneys, a note thereof was made by the senior partner of Runyon and Leonard, recognizing the right of Bryant and Co., under the order. That on the strength, credit, and faith of the order, Bryant and Co. gave further credit to Charles H. Wheeler, junior, for groceries, feed, and grain, some of which went to pay orders given by him to men who had worked under his contract, and advanced to him from time to time money (\$150), some of which was borrowed to pay witnesses' fees in the railway suit, and other expenses therein, some to pay a license fee due to the government, and some to pay Charles H. Wheeler, junior's, necessary traveling expenses. That to the affidavit is annexed a true copy of their account. Further, that no

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part of their claim has been paid, and that it all amount ~~s~~ to \$1689.64, with interest, is due, and that they have no security for it, or any part of it except by the order. ~~T~~hat the judgment recovered against the railway company, exclusive of costs, amounts to \$1961.50, and bears interest from June 7th, 1870; that out of it is to come \$250 for the fees of plaintiff's attorneys, over and above the taxed costs.

From this it appears that after paying the counsel fees of the suit, there will not remain enough money to pay Bryant and Co. the amount due, including interest, on their order.

The affidavit goes on to say, that John Ettenborough is, in the opinion of the deponent, the real owner of the judgment. That he knew at the time of filing the bill, of the existence of the claim of Bryant and Co., and knew it for a long time before that. That he employed counsel to draw the bill, and obtain the injunction, and that complainants have really, as the deponent believes, no interest in the claim, and took no part in the preparation of the bill obtaining the injunction, and that Ettenborough, as they believe and are informed, employed counsel to conduct supplementary proceedings above mentioned; and further that in a recent conversation which Ettenborough had with the deponent, he told him that he was interested in the collection of the claim.

In response to this the complainants have presented on the affidavit of John Ettenborough, which, it will be perceived, in no sense denies any of the statements contained in the affidavit of Mr. Morehouse, of the firm of Bryant and Co. the affidavit above set forth. In this affidavit Mr. Ettenborough admits that in the conduct of this suit he is acting for the complainants (he says as attorney in fact), but it is to be observed he does not deny that he is the only person interested in the claim, nor does he allege that the complainants have any interest in the suit. He admits, however, that he did it as attorney in fact, that he employed counsel to conduct the supplementary proceedings, and says that he resides at Belleville, where the Wheelers reside.

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that he is acquainted with them; that they are father and son, and that they have resided in the same house for more than a year past, and that Charles H. Wheeler, junior, is unmarried. This, with a statement contained in the affidavit in reference to the delay or stoppage in the supplementary proceedings, is all that is contained in the affidavit.

It will be seen, then, that the complainants in this case at the time of the filing of the bill, and before that time, well knew that the claim of Bryant and Co. existed to the money in the hands of the attorneys. Knowing this, they also knew that the Wheelers had not, and could not have any interest in the fund, for all of it, over and above the counsel fees of plaintiffs' attorneys in the suit, was needed to pay Bryant and Co.; and yet this bill is filed against the Wheelers, who have no interest in the suit as above stated, and Bryant & Co. are not made parties to it. The conclusion is irresistible, that the bill and injunction were intended by the complainants as means of indirectly obtaining that which they could not have obtained directly. By restraining the Wheelers and their attorneys from paying away the money, they, of course, prevent the attorneys from paying Bryant and Co., who are lawfully entitled to receive it.

Under these circumstances, it is respectfully submitted that Bryant and Co. should have relief, and that the injunction should be so modified that Bryant and Co. may be permitted to receive their money.

Mr. F. W. Stevens, contra.

The complainants in this suit, inasmuch as they are judgment and execution creditors, are entitled to the relief they seek, if they can show equitable grounds for such relief. 1 *Stockt.* 465; 4 *Johns. C. R.* 671.

The bill charges fraud, and in consequence thereof, that the judgment recovered in the joint names of Charles H. Wheeler and Charles H. Wheeler, junior, the defendants, is, in reality, the judgment of *Charles H. Wheeler alone*.

The firm of Bryant and Co., who are strangers to the suit

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as brought, make a motion to dissolve the injunction issued, so far as to permit their claims upon said judgment to be satisfied. They base their claims upon an order alleged to have been given to them by Charles H. Wheeler, and his son Charles H. Wheeler, junior, upon Wheeler and Son's attorneys, Messrs. Runyon and Leonard. The date of this order was March 21st, 1870. It was an order on the claim against the Montclair Railway Company, (given pending the suit against said company) to secure to said firm not only the sum then alleged to be due them from Charles H. Wheeler, junior, viz. \$1055.25, but such further sum as should accrue and become due to them from said Charles H. Wheeler, junior, which last mentioned sum amounted on August 12th, 1870, to \$634.39, making the total amount alleged to be due the firm under said order, \$1689.64.

The judgment against the said railway company, exclusive of costs, amounts to \$1961.50. The difference between \$1961.50 and \$1689.64, is \$271.86, and out of this residue Messrs. Runyon and Leonard request permission to deduct \$250 for their counsel fees, leaving only \$21.86 to be finally disposed of.

The order given to the said firm was presented to said attorneys on the same 21st day of March, 1870, and 'recognized' by said attorneys.

The insistment of the firm upon this motion, must doubtless be that they are the equitable assignees of a part of the said judgment, and in the absence of fraud their insistment would be proper, for a debtor may prefer one creditor to another.

The case of the complainants is based upon the fraud committed upon them. They submit, *that this is a fraudulent attempt to pay Charles H. Wheeler, junior's, debt with Charles H. Wheeler's money.*

First. The money is Charles H. Wheeler's. It is true that the claim was sued and judgment recovered in the name of father and son, jointly. But the affidavit of Hernando A. Fuller, annexed to the bill of complaint, shows

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under what circumstances, and for what reasons, the son was brought into the contract.

It appears by this affidavit, that on July 17th, 1869, proposals in writing were made by Charles H. Wheeler, which were signed by said Wheeler alone, and then accepted by said Fuller on behalf of the company. Nearly two months afterwards, Wheeler went to the office of said railway company, and desired to change the contract by inserting therein, after his own name, the words "and Son."

The motives that prompted that change might have been either laudable or fraudulent. But what language could more clearly reveal a fraudulent contrivance to avoid the payment of a debt? "That his creditors were suing him out where he lived, and wanted to ruin him; he wanted it just fixed so that they could not come and damage him, or seize his property."

As against the persons this alteration was intended to prejudice, it is void; that is to say, as to the complainants the contract must still be regarded as the contract of Charles H. Wheeler alone.

But *secondly*, the debt is Charles H. Wheeler, junior's, i. e. the debt of \$1689.64 claimed to be due the firm of Bryant and Co.)

H. W. Morehouse, (of the firm of said Bryant and Co.), in his affidavit asserts this to be the case. He nowhere pretends that Charles H. Wheeler, the father, is said firm's debtor, but swears that everything was charged against the son.

But a distinction must be taken.

The firm's claim under the order is in part prospective, in part retrospective.

1st, prospectively. As to the supplies furnished subsequently to March 21st, 1870, (the time when the order was given), they may have been furnished in good faith by said firm, on the security of said order. If that were the case, their equity as to this part of their demand appears to be as great as that of the complainants.

2nd, retrospectively. No such grounds however can be

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taken in reference to supplies furnished *prior* to March 21st, 1870. The firm (so we must conclude from H. W. Morehouse's affidavit) have given credit to the *son alone*. It would seem as if father and son might, as to at least a **part** of the claim, have been made jointly liable. Yet the **firm** elected to make the son their debtor, they cannot now **hold** the father. The election having been made, the **father** is under no legal obligation to them, and that, supposing **that** he may have received a benefit. *Hetfield v. Dow*, 3 *Dutcher* 440.

The father being under no legal obligation to the firm, the assignment of his interest in the judgment was purely **voluntary**. But a voluntary assignment is not allowed to **prevail** against those who were creditors prior to the assignment. 1 *Story's Eq. Jur.*, § 381.

Bona fides is not enough in such a case, the assignment must be made on valuable consideration; and here the father received no benefit from his assignment.

But in consequence of the fraud in affixing the words "and Son," to the contract with the Montclair Railway Company, the entire beneficial interest must be considered to be in Charles H. Wheeler, and nothing valuable could be considered as having passed, when said order was given to said firm, so far as said order or assignment was intended to embrace charges and debts that were prior to March 21st 1870.

To postpone their claim to the claim of the complainant can work them no injury; they have all their remedies unimpaired against the son.

It is claimed that over and above the \$1689.64 to be paid to the firm of Bryant and Co., \$250 should be paid out of residue of the judgment for counsel fees. But if the order given before judgment be an equitable assignment to the full amount claimed, said firm ought to contribute proportionally to the expenses of a suit in which said firm was chiefly interested.

If this injunction is dissolved to the extent asked, the

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will be practically at an end. It might be desirable to in the answer of Bryant and Co., as well as of the defend-

the court is of the opinion that the complainants in this e have any merits, they would beg leave to amend, out prejudice to the injunction, by making the members ie said firm parties, and by making such further amend- ts as will, without changing the nature of the case pre- ed by the bill of complaint, enable the court to make a ee that would afford the complainants adequate relief.

HÈ CHANCELLOR.

he injunction in this case is against C. H. Wheeler, and son C. H. Wheeler, junior, who are the only defendants.

to restrain them from receiving a sum of money in the ds of Runyon and Leonard, who, as their attorneys-at- have collected it for them, and from permitting it to be to any one for them or on their behalf. The defend- ts have not answered, or applied to dissolve or modify injunction.

he application is made by Bryant and Co., who claim to reditors of C. H. Wheeler, junior, and to hold an order . H. Wheeler and Son, both defendants, on Runyon and nard, for the amount of this debt, to be paid out of the ey collected by them. This order is dated and was pre- ed to Runyon and Leonard before the injunction. The btedness to Bryant and Co., and the order to them are stated in the bill, and as there is no answer, are shown affidavits to which no objections is made by the com- nants, who rebut them by a counter affidavit.

fo one but a party to a suit can make any motion in it, ept for the purpose of being made a party. The defend- s only are enjoined. If they do not wish to be free n the injunction no one else can ask it for them. If it ds further action on the part of the defendants to au- rize their attorneys to pay the money to Bryant and Co., dissolution alone would be of no use to Bryant and Co.

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If the defendants would authorize the money to be paid, they would apply for the dissolution or permit it to be applied for in their name.

If, on the other hand, Bryant and Co. have, as they claim, an order given and signed in good faith before the injunction, which in effect assigns these moneys or any part thereof to them, especially if accepted by these attorneys, they have their remedy against them, and Runyon and Leonard would be warranted and compelled to pay these moneys to them, and they would not pay them as the attorneys of Wheeler and Son, but by virtue of an assignment by which the moneys are claimed, not under, but adversely to them. If the moneys are not so assigned, the injunction ought not to be dissolved, except for want of equity appearing either on the face of the bill or by the denials of the answer.

The motion must be denied -

WETMORE and others vs. MIDMER, sheriff, and another.

Where a testator made his executors trustees of all property, estate interests, given or devised by his will (excepting a life estate in the mansion house devised to his son), with authority to sell and convey all or any part of his real estate, the power to sell prevails over the prior devises; and execution levying on such estate and interests, issued after the same was sold and conveyed by the executors, upon a judgment recovered before such sale and conveyance, is subordinate to the power of sale and can have effect on the property.

This cause was argued before the Hon. Joseph F. Randal, one of the masters of the court, sitting for the Chancellor, on demurrer to a bill for injunction.

Mr. Scofield, in support of the demurrer.

Messrs. L. & A. Zabriskie, for complainants, contra.

Wetmore v. Midmer.

THE MASTER.

John Tonnele, late of Hudson county, died seized in fee of a considerable amount of real estate, situate in said county, amongst which were the premises in question. Prior to his death he made and duly executed his last will and testament, which was duly proved by his executors. By it he devised certain of his real estate to his wife for life in lieu of dower; giving also to his son Laurent John Tonnele a life estate in his mansion-house and part of the grounds belonging thereto, subject to the life estate of his widow; the rest of his estate was divided amongst his children equally, so that each should receive only the income of his or her share during life, and at death his or her share should go to the lawful issue.

The seventh section of the will provides that "in order more fully to carry out the object of this my will, I do hereby appoint and declare my executors, hereinafter named, to be trustees of all property, estate, or interest therein given or devised to any of my children, or that any of my children may be entitled to by virtue of any provision in this my last will, during the life of such child (excepting the life estate in the mansion-house devised to my son), with full power to retain all such property in their hands unsold and undivided, until after the year eighteen hundred and sixty-seven; and I do authorize my said executors to sell and convey all or any part of my real estate and all real estate that may be purchased by them," &c., &c.

The bill of complaint sets forth the provisions of the will, and its probate by the executors on the 11th day of December, 1852. That afterwards the executors sold to Robert J. Bacot, by virtue of the power given in said will, for the sum of \$50,000, the said lands described in said will as the mansion-house of said John Tonnele, deceased, and included the map mentioned in said bill; which property was subsequently cut up into numerous lots and streets, and the lots, or a large portion of them sold to the several persons named in said bill, the owners of which had built houses

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and made improvements thereon; all claiming through the first purchase of Robert C. Bacot.

The bill also sets forth that on or about the 22d day of November, 1861, James Wallace recovered a judgment in the Supreme Court of this state against said Laurent John Tonnele and one Timothy Dergan for the sum of \$759.33 for his damages and costs, and afterwards at the Term of February, 1869, procured an *alias* to be issued out of said court to the sheriff of the county of Hudson, by whom it was received, and the property levied on and advertised to be sold at sheriff's sale; that the property so advertised was all held under and by virtue of the said deed made by said executors to said Robert C. Bacot, and that it had become of great value, equal to \$250,000. The bill insists that the claim by and through said deed to Mr. Bacot is good and valid, and that there was no valid lien on said premises by reason of said judgment and execution.

The bill also alleges that the sheriff intends and will sell the premises if not restrained by this court, and that such sale will make no title to the same, but be a mere cloud over the property, injurious to the sale thereof at any future time. To avoid which an injunction is prayed for and such other relief as might be equitable and just. The injunction was granted according to the prayer of the bill, and commanded and enjoined the defendants, John H. Midmer, sheriff of the county of Hudson, and James Wallace, that they do absolutely desist and refrain from further proceedings to sell, or from selling, under the execution issued out of the Supreme Court of the state of New Jersey at the suit of James Wallace against Laurent John Tonnele and Timothy Dergan, any part of the tract of land containing nine acres and fifteen hundredths of an acre, known as the homestead lot, late of John Tonnele, deceased, and situate in the city of Hudson, in the county of Hudson, in this state, except lots numbered forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, seventy-three, seventy-four and seventy-one, as laid down on the map of said pro-

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deed for Robert C. Bacot in 1864, which lots are said to have been purchased by Francis W. Mitchell and Isaac Day.

The bill defendants have put in a demurrer, and the grounds of demurrer are assigned and set forth. The point particularly insisted on is as to the power given by the will to sell that part of the mansion-house and grounds for life to the son, Laurent John Tonnele, and the effect of Wallace's judgment against Tonnele and Dergan, made prior to the deed to Bacot, and the execution of the deed which is subsequent to the deed, may have upon the deed to Bacot and his assigns. The first point was decided in *Bacot v. Wetmore*, 2 C. E. Green 250, by Chancellor, whose view I adopt without hesitation as the correct view that can be taken of the question. The power given in the will to the executors to sell all or any of the lands devised is in broad, decided language, without exception, and must therefore prevail over the prior judgment which must be taken as subject to this power and execution. This being the case, it follows that Wallace's judgment and execution must be subordinate to the absolute power of sale vested in the executors. The sale by the executors can only be made, if at all, subject to that power, and if that power has been exhausted prior to the issue or the execution, the execution itself can have no effect upon the property.

The demurrer, therefore, must be overruled, with costs.

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A mortgage is presumed to be satisfied, if no claim has been made and no money paid upon it within twenty years after it becomes due, and no circumstances are shown to explain the delay and rebut the presumption.

A judgment will not be presumed, because the statute of limitations has not run, nor has a suit on the bond.

Mayer v. Mayer.

Argued upon final hearing, on bill, answer, and proofs.

Mr. J. Evans, for complainant.

Mr. T. D. Horsey, for defendant.

THE CHANCELLOR.

The bill was filed November 10th, 1869, to foreclose a mortgage made April 7th, 1847, to secure a sum payable in three years from the date. The mortgage was accompanied by a bond with the same condition, on which no interest was paid after April, 1848. The defendant sets up the statute of limitations. I must take the rule in such case to be settled by the decision of Chancellor Vroom, in *Wanmaker's Ex'r v. Van Buskirk*, Saxt. 685, that a mortgage is presumed to be satisfied, if no claim has been made, and no interest paid upon it within twenty years after it becomes due, and no circumstances are shown to explain the delay and rebut the presumption; and that payment will not be presumed, because the statute of limitations has, at law, barred a suit on the bond. In the *Wanmaker* case, the statute of limitations had clearly run as against the bond, but it was held that the mortgage was valid, and that presumption of payment did not exist.

The complainant is entitled to a decree -

MAYER vs. MAYER.

1. It is not sufficient to entitle a party to a divorce on the ground of adultery, to prove that the defendant who might be supposed willing to commit the adultery, was in a position in which it was possible to commit it. It must be shown that the defendant and the party with whom crime is charged to have been committed, were together under suspicious circumstances, which cannot be easily accounted for, unless they had design, or which could not well be explained without it.

2. The testimony of a defendant charged with adultery, and of the supposed adulterer, is competent, and in a doubtful case, must control the question.

Mayer v. Mayer.

On bill for divorce. Argued upon the pleadings and proofs, on final hearing.

Mr. J. B. Vredenburg, for complainant.

Mr. Dixon, for defendant.

THE CHANCELLOR.

There is no evidence in this case sufficient to establish the adultery charged. There is proof that the affections of the defendant were estranged from her husband during the last two weeks that they lived together, if indeed she ever had any for him; and that at the time she was on good terms and intimate with Bachmann, the alleged adulterer, who was a workman in her husband's barber shop. His parents and sister, with whom he lived, had rooms in the same house. But the only proof is that they were intimate in a way in which they might be so in their relative situation without criminality. Nothing wanton or lascivious, or approaching to it, is shown either in act or conversation between them. I lay out of question the German toast, because it is denied by Bachmann that she ever gave it, and is not recollected by her, and the change of a single word puts it in the language in which she swears she gave it, if she gave it at all, and makes it harmless. And even giving to the toast its worst meaning, that so intelligently explained by the witness, Guttinger, I can conceive that she used it without comprehending the distinction between it and the harmless one which she had learned from the complainant, especially as a number of German witnesses examined before Guttinger, were all much mystified as to its meaning or its application.

There were no doubt occasions when these parties could have committed adultery; occasions which they would more probably have embraced, than the nights in which she with her two children slept on the floor in the room in which his mother and sister occupied one bed, and he and his brother another. Yet even then it was possible. But I see no

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reason to infer it under the circumstances attending that affair.

It is not sufficient to convict parties who may be supposed willing to commit adultery, to prove that they were in a position that it was possible to commit it. It must be shown that they were together under suspicious circumstances which cannot be easily accounted for unless they had that design, or which could not well be explained without it.

But beside the want of circumstantial testimony sufficient to prove, or even raise a strong presumption of guilt, the positive oath of the defendant and the supposed adulterer, clearly deny the charge. This testimony is competent, and although not of the most reliable kind, and of little weight against clear proof, is sufficient in this case to settle the question.

I am not convinced by the proof, and I do not believe that the defendant was guilty of the adultery charged against her.

The bill must be dismissed.

LAING vs. LAING.

Improvvidence and gross intemperance on the part of the husband and a failure to support his wife, may justify her in leaving him, but do not amount to the extreme cruelty that would justify a divorce *a mensa et thoro*; much less will they convert her leaving into a desertion by him, so as to entitle her to a divorce for it.

This cause was submitted on final hearing, upon the pleadings and proofs.

Mr. Clark, for complainant.

Mr. Magie, for defendant.

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THE CHANCELLOR.

The complainant petitions for a divorce on account of the willful, continued, and obstinate desertion of her husband for more than three years. In August, 1865, she left the defendant, her husband, to whom she had been married for seventeen years, and has since lived apart from him. She alleges that she was compelled to leave him on account of his cruel treatment of her, of his continued intemperance, and because he provided no support for herself and her family.

It is claimed that such compulsory leaving, although the going away is her act, amounts to a desertion on the part of the husband.

It is a recognized principle, that when a husband treats his wife with such cruelty or violence that she is obliged to leave him for safety, or to avoid personal injury, this compulsory flight amounts to a desertion by him; and if he does not seek his wife, and try to persuade her to return with promises of amendment, that such absence, if continued for the requisite time, is a willful and obstinate desertion on his part.

But if she leaves him because he is intemperate, improvident, fails to support her, or because his bad temper or intemperance makes her home disagreeable, this is not a desertion on his part. Habitual drunkenness is not, in this state, a ground of divorce. It would become such substantially, if the doctrine should be established that a wife might leave her husband for it, and then have a divorce on the ground that he deserted her. Even extreme cruelty is not a ground of divorce *a vinculo*; and a much less degree of cruelty would justify a divorce *a mensa et thoro*, than it would require to convert a leaving him by the wife, into a desertion by the husband. And to convert a leaving by the wife into a desertion by the husband, she must go away for her own safety, and to protect herself from his violence. The causes of divorce in this state are ample, and I feel no

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inclination to increase or extend them by judicial construction.

The defendant was, no doubt, an intemperate and improvident man, and in his fits of drunkenness did sometimes abuse, threaten, and strike his wife. She had twice before left him on these accounts, remained away for a few months, and then returned to live with him, or received him with her. He once knocked her down, once pulled her hair, several times had pinched and pushed her; but he had inflicted no serious injury, and after this treatment she had condoned it, and lived with him again. There does not appear to have been any new violence or cruelty, or threats of violence, that was the cause of her leaving.

She had become tired of a continued life of discomfort with a reckless, intemperate husband, who neither provided for her support or his own, and whose demeanor and conduct in his fits of drunkenness, was an annoyance and disgrace to her and her children, and on this account she left him. These circumstances may have justified her in leaving him, but they do not amount to the extreme cruelty that would justify a divorce *a mensa et thoro*, much less do they authorize her to convert her leaving into a desertion by him, and entitle her to a divorce for it. There are thousands of cases where one party could leave the other and justify it, on stronger grounds than these, and thousands of divorces would be added to numbers now too large. There are many who constantly endure what the complainant left her husband for. Undoubtedly, blows and personal violence are sufficient to authorize a judicial separation, but they must be such as indicate cruelty or malignity. A single blow given in a fit of passion and repented of, or in a drunken spree when reason was dethroned, does not amount to extreme cruelty; nor does it, in many situations and circumstances of life, even if repeated several times in the course of a few years.

Upon a careful consideration of the evidence, in which I have not been aided by the views of counsel, I do not think

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that the complainant has established a case in which she was compelled for safety to leave the defendant, so as to convert her leaving into a willful desertion by him.

The prayer of the petition must be denied.

WOODWORTH vs. WOODWORTH.

1. When husband and wife are living separately, and one seeks a divorce from the other on the ground of desertion, the facts relied upon to convert the living separately into a desertion, must be proved by other testimony than the oath of the complainant alone.

2. Although the testimony of a party is competent in divorce cases, a divorce will never be granted upon such testimony alone as to the cause of divorce.

On petition for divorce, for desertion. The defendant did not appear. The hearing was on proofs taken *ex parte*, and a master's report.

Mr. C. T. Reed, for complainant.

THE CHANCELLOR.

If the depositions of the complainant are stricken out of the case, it appears by the other proof that the complainant, after living with his wife in Connecticut for nineteen years from their marriage, comfortably and peaceably, about four years ago left her at Connecticut and came to New Jersey to buy a farm and cultivate fruit, and that he has lived here ever since, leaving her in Connecticut. It does not appear that he ever told her where he was going, or for what purpose; or that she knows what became of him, or that he ever requested her to come to New Jersey with him, or that he would have received her had she found him out and followed him. It appears by three witnesses that he has been for four years living in New Jersey without her,

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and by one that she is living in Connecticut without **him**. But no witness knows which deserted the other, or **whether** they are not living so by mutual consent and agreement.

The facts relied upon to convert the living separately into a desertion are proved by the oath of the complainant **alone**. It is the settled rule that although the testimony of a **party** is competent in divorce cases, a divorce will never be **granted** upon such testimony alone as to the cause of divorce. **The** new affidavits taken since the former ruling on this point **it**, do not in any degree obviate the difficulty.

The divorce must be refused.

CASES

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1871.

ROE'S EXECUTORS *vs.* ROE and others.

A provision by a testator for a home for his widow and minor children until all become of age, under the direction of their mother, will be defeated as to the widow, by her election not to accept it in lieu of dower as provided in the will. But the substantial benefit intended for the infant children by devoting the amount directed to their support, will not be wholly defeated by such election of the widow; and a court of equity will see to it that the amount set apart by the testator for that purpose shall be applied to the benefit of the infants substantially as intended by the testator.

The bill was filed by the complainants for directions as to the administration and settlement of the estate of their testator, and involves the construction of his will. The widow and devisees, including all the children of the testator, are made parties. Four of these children are infants. The facts which appear by the answers of the adult defendants, and by proofs as against the infants, are these:

The testator died in December, 1867, leaving a widow, the defendant, Keturah Roe, and nine children; four of these were children of a former wife; four of the children of Keturah were and are still under age. By his will, made

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in November, 1867, after directing his debts to be paid and giving \$1000 to each of his nine children, except one, to whom he had advanced that amount, he directed in the eighth clause, as follows: "That my executors invest \$800 in a suitable and well improved farm in the county of Sussex, and hold the same in trust for the use of my wife Keturah and my sister Hannah Cox, wife of David Cox, if she be left a widow, and during her widowhood, and my five children, Amzi, Charles, Sarah, Amelia, and Carrie, until the youngest of my said children shall arrive at the age of twenty-one years, or until the death or marriage of my said wife Keturah; it being my intention and purpose in this manner to provide a home for my wife and younger children; and it is my wish and desire that they live together as one family. And I do further order and direct my executors to place upon the said farm for their use, stock and farming utensils sufficient for the same, not to exceed in value \$1500, and hold the same in trust as aforesaid."

He further directed that his wife and said five children should have the use of all his household goods while they remained on the farm so to be purchased; and if the proceeds of the farm should not be sufficient for the comfortable support and maintenance of his wife and his said five children, he directed that his executors should make up the deficiency out of the interest accruing on the part of his estate in their hands.

He directed that if either of these children should marry his or her right to enjoy such home should cease; and that if his wife should marry, the trust should immediately terminate.

He gave all the residue of his property to his nine children equally, but provided that if his wife should marry, the whole should go exclusively to the four children of his first marriage; and declared that the provisions for his wife were in lieu of her right of dower. He directed his executors to keep all moneys in their hands invested,

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nd that the interest should go into and form part of his state.

In the last clause of the will he directed his executors, on the termination of the trust, either by his youngest child arriving at full age, or by the death or marriage of his wife, to sell the property held in trust, and to settle up his estate as by the will before directed, provided each of his children should have at that time arrived at the age of twenty-one; but in case either of them should still be under that age, he directs his executors to invest the share of such securely, and pay to each the interest thereof during minority, and the principal when of age.

The widow, within six months from testator's death, renounced the provisions of the will in her favor and refused to accept them in lieu of her dower, and filed such renunciation and refusal, duly executed, in the office of the surrogate of Sussex, the county in which the testator resided at his death.

The four children of the first marriage, by a deed dated May 30th, 1868, released and conveyed to the five children of the widow all right in the residue of the estate, which might accrue to them on the marriage of the widow, by the provisions of the will; this deed was not to prevent the termination of the trust by such marriage.

The executors, by virtue of a power in the will, sold all the testator's real estate and settled their final account of the whole estate in the Orphans Court of Sussex county, in September, 1869, when the account was allowed by the court.

The real estate was sold for \$17,544, and the widow joined in the sale and conveyed her right of dower, on condition that \$5848, one-third of the purchase money, should be invested for her benefit and the interest paid to her for her life, which was done by the executors. The personal estate amounted to \$11,678.85, including the household goods, valued at \$434.56. The balance found at the account remaining in the hands of the executors, after deducting debts and expenses of administration, the special

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legacies which had been paid, and the sum invested for the life of the widow, was \$17,365.83.

The children of the first marriage claim that the trust wholly failed and has terminated, by reason of the refusal of the widow to accept her interest in it, without which a home could not be constituted and provided for the family, and that in consequence of this failure the estate must now be distributed as directed by the will, among all the testator's children; that their deed of release has destroyed the contingency, and the share of each child is fixed and vested.

On part of the children of the second marriage, it is claimed that the renunciation of the widow could only affect her own interest in the trust, and that they are entitled to have the provision of the trust carried into effect as far as they are concerned. Hannah Cox claims the same for her part.

The executors are advised that they cannot safely settle up the estate, as claimed by the children of the first wife, or safely proceed to carry out the directions for the trust, and pray the direction of the court.

Mr. D. Haines, for complainants.

Mr. Coult and *Mr. Van Blarcom*, for Mrs. Roe, Mrs. Cox, and infants.

Mr. Skinner, for W. C. Roe and others.

THE CHANCELLOR.

The only duty of the court in this case is to guard the interest of Mrs. Cox and the infant defendants. All the others are willing that the executors should immediately divide and pay over the residue of the estate in their hands equally among the nine children; the sum invested for the widow to be divided in like manner, at her death. This would, no doubt, be the best settlement of the whole matter.

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were it not that the infants may have rights arising from the plain intention of their father to provide for their support until all became of age out of the bulk of his property before it was divided. He supposed he had secured the co-operation of his widow in this, by cutting off her children from all interest in his estate in case by her marriage she broke up the home he provided. He declared his trust should last until his widow died or married, or until his children were all married or of age. He provided for these cases; but he did not foresee that the trust might, in part at least, be frustrated by the refusal of his wife to accept its provisions in lieu of her dower, and made no provision for that case. The widow, for herself, had a perfect right to elect to retain her dower. The amount she receives may be, so far as she is concerned, more valuable and of longer duration than the provisions of the will. But neither her choice, nor the release of the contingent limitation in case of her re-marriage, can divest any substantial right given by the will to her children and vested in them. She may render it difficult or impossible to carry out the provision in the way intended by the testator, but it is the duty of the court to protect these rights and have them carried out, if not in the precise mode directed by the testator, yet as near that mode as practicable.

For the children of his second wife the testator intended two things: first, to provide them a home with and under the care of their mother until the youngest became of age, to the extent of the sums provided, to wit, \$9500 and his household furniture; secondly, to provide them with sufficient and comfortable support, to the extent of that investment for a home, and of the interest on all the residue of his estate, if the farm provided was insufficient. To his other children he only intended to give an equal share of the residue of his estate, including accumulated interest, after this trust should terminate; it could last until the youngest child came of age, and no longer. If these children receive this they will receive all that their father in-

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tended for them. A benefit intended for them in case of the marriage of the widow they have voluntarily renounced, but they are still entitled to their equal share upon her death or marriage. I see no claim that these four children have to an equal distribution of the estate now, so as to defeat the right of the others to support out of the estate provided and intended to be given by their father.

The rights of the five children cannot be lost or forfeited by the conduct or default of their mother, and they should be secured to them in such way as is practicable, but without infringing on the rights of the other four children. So far as these rights are infringed by the renunciation of their step-mother, they can have no relief.

It is possible that a home might yet be furnished for these children with their mother in the manner directed by the will, provided she would agree to live with them on the farm, and provide for her own maintenance and support out of her own means. It is the provision for her support, and not her living in the same home with her children, that are given in lieu of dower, and forfeited by her renunciation. But this can only be done by arrangement of the parties, and not by direction of the court.

I must regard the case as if the intention of providing a home for these children is defeated, and consider whether the provision for their support is frustrated thereby. The provision is clearly declared by the will, and there is no forfeiture of it declared, either directly or by inference, on account of the refusal of the widow to accept the provision for her. The amount set aside for the support of the children, Mrs. Roe and Mrs. Cox, by providing a farm, its stock and utensils, and the household furniture, was £4,560. Of this, one-seventh may be considered as intended for Mrs. Roe, and one-seventh for Mrs. Cox; the rest to the five children, or such of them as remain unmarried. And it is just and equitable that this amount, if it cannot be appropriated to the support of these children in the way by the will, should be applied to that object in the

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ty in which it can be done, by directing the interest to be paid for that purpose.

The residue of the principal must be kept invested until the time for distribution directed by the will, that is, the termination of the time by the youngest child becoming of age, or by the death or marriage of the widow.

Out of the interest of this residue these children may be titled to aid in their support. In what case and to what extent they may be entitled to such aid, it may be very difficult to determine, and it is not necessary now to lay down any rule; it is enough for the matter now before me, to determine that they may be entitled to it. The executors have then no right to distribute that fund and deprive them the possibility of such aid.

In my opinion, the five children of Mrs. Roe, or such of them as remain unmarried, are entitled to the interest of five-sevenths of the sum of \$9934.56, set aside for this trust, until the termination of the trust; and that Mrs. Cox is entitled to the interest of one-seventh during her widowhood, the same to go to the five children in case her right expires before the termination of the trust.

STEVENSON vs. THE ERIE RAILWAY COMPANY.

1. An act authorizing a railroad company to construct their road along a river, does not authorize them to construct it *in* or *upon* the river, but along side of it. The word "along" does not mean "upon," unless the context shows that it is used in the sense of *upon and along*.

2. Authority to construct a railroad *along* a river, must be held not to authorize it to be constructed in the river from the subject matter, as it could not be constructed in the river, without authority first to fill in the river bed.

3. That a power granted will not be sufficient to effect the object, will not by implication enlarge the power, unless it appears that the legislature in granting it, knew that such construction was necessary to effect the object. The applicants must see to it that the power conferred is sufficient to effect

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their purpose, and not seek by implication to extend it in a manner which the legislature might not have been willing to grant.

4. Where the provision of an act clearly shows that it was intended that the road authorized by it should be constructed outside of a river, no necessity to go into the river for the construction of it will, by implication, confer authority to construct it in the river. The grant must fail if the road cannot be built outside of the river.

This case came up on a rule to show cause why an injunction should not issue against the defendants, to restrain them from running trains on the road of the Paterson and New York Railroad Company, leased to them, in front of the lands of the complainant, and over a wharf built by him in front of them, on the shore of the Passaic, and from laying a second track on part of his wharf that was further in the river, and in the river beyond his wharf. The affidavits annexed to the bill, the answer of the defendants, and the affidavits annexed, and affidavits in reply, were read without objection.

Mr. Abeel and Mr. Williamson, for the rule.

Mr. C. Parker, contra.

THE CHANCELLOR.

The principal question in this case is the same as decided in the Court of Errors, in a writ of error by Paterson and New York Railroad Company, against complainant in this suit. That question is, whether railroad company, by their charter or the supplement of 1866, were authorized to construct their road in Passaic river. The Court of Errors almost unanimously affirmed the decision of Justice Depue at circuit, holding that they were not so authorized.

But the Chief Justice, in delivering the opinion of Court of Errors, says: "I think there are no terms in this statute which, fairly interpreted, imply an intent to confer on the defendants the privilege asserted, nor

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privilege *necessarily result* from the general powers conferred." And Justice Depue, in his opinion at the circuit: "An intent to alienate any portion of the lands of the state belonging to the state, will not, in the absence of a formal grant in express words, be implied, except upon a *real necessity to effectuate* the purpose of the legislature in granting the grantee with public franchises." And the parties here contend, that while the Court of Errors decided that the words used in the act of 1866, "authorizing them to construct their road along the Passaic river," themselves, only authorize them to construct it along side of the river, and not in or upon it; yet that as facts shown in this case, and not then before the court, demonstrate so great a necessity for effectuating the purpose of the legislature, that an intention to confer the privilege asserted will be implied, and the privilege asserted necessarily results from the powers conferred.

The whole force of the grant depends upon the meaning of the phrase '*along the river.*' The established and only meaning of this word as here used, is *beside* and *along the course of*, or *along side*. When the phrase '*road along*' a road is used, the word *upon* qualifies the meaning of *along*; and this is the case in almost all the acts of the legislature. It shows that *along* may be used to mean *upon*, as well as *along side of*. The subject matter must control the meaning of the word were there any doubt; a railroad cannot be built *in* a river unless it is first filled in, and no authority is here given to fill it in. And even if giving authority to construct a railroad along a turnpike, could be construed to authorize laying it upon the turnpike, such could not be inferred, if the authority given was to lay it along side of the turnpike.

The subject matter in that case as in this, forbids such a construction. And when language is so plain, and so clear in its meaning, as this phrase is here, no implication can be made, or prevail against it. An act authorizing a railroad to be constructed on the west bank of a river, might

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as well be construed to authorize it on the east bank, on account of insuperable difficulties on the bank designated.

Such implication as is referred to in these opinions, only arises where it is not contrary to the provisions of the act or the natural and proper meaning of the words used. An act authorizing the construction of a railroad from Newark to Jersey City, might be held by implication to authorize bridges over the two navigable rivers on the route, although it requires positive authority to bridge navigable rivers, which are public highways. But such authority could never be implied, if the terms of the grant expressly excluded the right to bridge navigable streams, as the words "along the river" here exclude their going into it. A right to bridge all streams not actually used for navigation, would exclude the implication.

Power to construct a canal not more than seventy feet wide, restricted at a certain point to pass between two houses, which are only fifty feet apart, would not give power to take down either of the houses. The word *between* prevents an implication. Nor, in this case, if the road had been directed to be constructed between high water mark, and a stone wall along the east line of the cemetery, could authority have been implied to construct it in the river, or inside the cemetery wall, although the space between them had been only ten feet.

Parties applying for a grant must see to it that the term used will effect their purpose, or else the grant must fail; will not be sustained at the expense of others intended to be protected. The legislature here intended to protect the public by the words "along the Passaic river," and the cemetery by the words "outside and to the east of the present stone wall embankment of the cemetery grounds." And a party taking a grant for such easement, must fail if the subject matter is not there.

Perhaps if the legislature had been advised that there was no space between such embankment and the river, they would have granted the right further to invade the cemetery.

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tery, or perhaps to take the public property below high water line. This court cannot decide which they would or ought to have granted. It can hold that they have not granted either.

But the necessity for such construction does not arise from the facts; they are not such as assumed in the above view. The act provides that the railroad shall not encroach upon the lands of the cemetery, which *are used* for burial purposes in said cemetery, which would imply that it might occupy those lands in it not used for such purposes; and it provides that it should be constructed "outside and to the east of the present stone wall embankment of the cemetery company." This appears to fix a definite line as the east boundary of the part of the cemetery, which the railroad should not invade, *outside* of which it should be built. But in fact there is not, and never was, such *stone wall embankment*. There was nothing but a decayed picket fence. There is a stone wall or fence between the cemetery and the complainant's lands, to the south of it; a mere division fence with no embankment. It terminates thirty-three feet from high water line. The legislature were mis-informed and deceived as to the facts on which they founded this grant; and the words of the grant which protect the rights of the state, cannot be held to be controlled and used in a meaning different from their proper and usual sense, by facts of which the grantors were not informed, or as to which they were deceived.

And the fact that this provision requires that before entering upon *the cemetery lands* the railroad company shall enter into an agreement about a stone wall, shows that an entry on these lands was intended.

The provision that the road shall not encroach on lands *used* for burial purposes, is entirely inconsistent with the *idea* that the road would be built in the river, or on the *shore*, as it could not have been supposed that the river *bed* was used for interments. Also the provision that in *front* of the cemetery the road should be near the line of

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high water, shows a design to save as much of the cemetery as possible. If intended to protect the river from invasion, it would have been extended to the whole route.

Besides, there is thirty-three feet between the end of the stone wall and high water, and sixty feet between the nearest lands that have been used for burial purposes and high water. This is sufficient for two tracks; there is no necessity for more, none is shown, no necessity for any greater width appears to have been contemplated by the legislature, which must appear, to extend any grant by implication beyond its terms.

This grant is so restricted by its very terms and restrictions, that it cannot be extended by implication arising from the necessity of such extension for the construction of the work; and if it could be, no such necessity exists. The decision of the Court of Errors must control this case, without reference to the question of estoppel. The defendants have no right to construct the road in the river.

With regard to the track already built and in use, the complainant has a sufficient remedy at law. It was placed there without authority. He has now filled in the shore low water line, and the land so reclaimed is his fee to appropriate to his own use. Ejectment will lie, and an action mesne profits will in one suit give him his damages for detention. Injunctions do sometimes issue to restrain constantly repeated trespasses requiring a continued succession of suits, but not where ejectment will restore the complainant to all his rights. Besides, the trains of the defendants are daily running over this track, and to stop them immediately would cause great inconvenience to the public as well as to the defendants; and in such case this court, when it has any discretion, will not interfere by injunction, but leave the complainant to his remedy at law.

The second track is being constructed, or is about to be constructed, in part upon the land filled in and reclaimed by the complainant on the shore, and in part on land filled in

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below low water line, and in part on lands in the river not reclaimed.

As to the part filled in on the shore, it is the freehold of the complainant, and he has a right to the protection of this court to enforce the provision of the Constitution, that lands in such cases shall not be taken until after compensation; as to the part beyond this, he has a right of passage over it to the river. He has it in common with the rest of the public; but it was expressly held in the Court of Errors that this injury to him was peculiar and different from that of the rest of the public, and that he was entitled to sustain a civil action for that injury.

According to the view taken of the grant to their lessors, by the Court of Errors, the defendants are mere trespassers, willful wrong doers. They have no rights that can be taken into consideration and weighed against the rights of the complainant, or the importance of his injuries. The public travel or transportation will not be injured or interfered with, and there is no reason why the relief to which the complainant is entitled should be withheld. The right is settled by the decision of the highest court of law, which has also held that such a structure is an interference with it.

Let the injunction prayed for against the building a second track, and driving piles in front of the complainant, issue. That against the running of trains on the track already built, is refused.

HAYES' EXECUTORS vs. HAYES and others.

1. A codicil revoking in express terms a legacy in the will, because the testator had provided the legatee with a permanent home, when in fact he had not so provided, will not be declared inoperative because made by mistake, no other evidence of the mistake being shown. The testator must have known whether he had provided such home.

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2. Where a will is divided into paragraphs, clearly defined in the way, a gift to legatees specified in the fourth paragraph will not be held to be by mistake for the legatees in another paragraph from some probability that the testator would more likely have given it to these last legatees. To change the express and definite words of a bequest it must clearly appear that the testator did not intend what he said, and this by the provisions of the will.

The argument in this case was had upon the bill and answer of the infant defendants.

Mr. W. Vanderpool, for complainants.

Mr. J. W. Taylor, for defendants.

THE CHANCELLOR.

This suit is to settle the construction of the will of Oliver J. Hayes, the testator of the complainants, and for directions as to the execution of its provisions by them. The will has a codicil annexed, out of which all the questions arise.

The original will, in its mechanical construction, consisted of thirteen paragraphs besides the testatum clause, each paragraph distinctly marked in the usual way by a blank space between it and the end of the preceding one, and commencing the line with a capital letter at a distance from the margin. There is no difficulty in distinguishing and numbering the paragraphs.

The fourth paragraph gives \$40,000 to his executor to be invested, the interest to be paid to his wife for life, and then to his two daughters for their lives, and at their death to their issue, who were to receive the principal when the youngest should come of age.

The sixth paragraph gives \$15,000 to his executors to be invested, the interest to be paid to his brother, John Hayes, during his life, and after his death to his children respectively, until they arrive at twenty-one years of age, each to receive his share of the principal upon arriving

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nty-one. If neither of these children reach twenty-one, leave issue, he divided the fund in specified portions among eight legatees.

The seventh paragraph gives the interest of \$1000 to E. Emeline Baldwin, and the principal at her death to her heirs-at-law.

The eighth paragraph gives the interest of \$1000 to Crisstant and Camilla Durant for their lives, and the principal at their death to the Methodist Episcopal Society for promoting Christian worship at Buenos Ayres. And to the last society he gives \$500 in the ninth paragraph.

In the tenth paragraph he states that the bequests in his will amount to \$70,000, and directs that if the net proceeds of his estate should amount to more or less than that sum, the bequests should each be increased or diminished, as the case might be, and in proportion to such bequests, and thus made to absorb his residuary estate.

To this will, executed May 18th, 1856, there is a codicil, dated June 6th, 1860. In this he declares "that having since the date of said will provided my brother John C. Hayes with a place for a permanent home, I do hereby reduce the amount bequeathed to my executors for his benefit from \$15,000 to \$10,000. I also reduce the legacy of \$1000 to the Newark Female Charitable Society to \$500; and I also revoke and wholly cancel the legacies of \$1000 and \$500 given in said will to the American Board of Foreign Missions, and the Methodist Episcopal Society for promoting Christian worship at Buenos Ayres. These deductions amount to \$7000. And it is my will that the said sum be apportioned by my executors, and paid over by them among and to the remaining legatees, particularly named in the fourth, sixth, and seventh paragraphs of my said will, according to the amount they are entitled by said will to receive."

The testator had furnished to his brother, John C. Hayes, a residence at Summit, New Jersey, upon which he had relied, but did not convey the title to him; so that at the

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testator's death his right to remain there ended. The question raised is, whether the revocation of \$5000, part the legacy to John, is not void as made under a mistake. In *Campbell v. French*, 3 Ves. 321, Lord Eldon held the revocation of a legacy to nephews of the testator living in a foreign country, whom he had never seen, stated to be void because they were dead, when in fact they survived the testator, was void, because made under mistake as to the facts, through wrong information. But in this case no mistake is shown; he had not made a provision that was permanent, but he must have known whether he had so provided or not. He had provided a home, and may have intended to make it permanent at some future time, and omitted to do so, either from neglect or because he changed his mind, which he had a right to do. In *Kennell v. Abbott*, 4 T. R. 808, a bequest by a woman to a man, to whom she had been formally married, and with whom she was living as his wife, but who had a former wife living of which she had no knowledge, she styling him in the bequest her dear husband, was held to be void. It was made under a clear mistake, into which she was led by the fraud of the legatee.

This case does not fall within the principle of these decisions, and it would be dangerous to extend it. It would cause every recital of a faithful wife, or trusty friend, or honest servant, to be inquired into to affect the validity of the bequest.

The next question arises upon the allegation that the testator in disposing of the \$7000, the amount of the legacy revoked by the codicil, had made a mistake in the number of the paragraphs; he gives this amount to the legatees particularly specified in the fourth, sixth, and seventh paragraphs of the will. That instead of the fourth, sixth, and seventh, he intended the fourth, seventh, and eighth. It is contended for on the ground that it is evident from the provisions of the will, that he did not intend to take from his brother \$5000 in one sentence, and give him 15-5¢ of \$7000 in the next sentence. That he would more

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bably have taken from him directly \$3175, or such amount as would have effected his purpose. I do not think this a natural or probable conclusion. He had provided, or intended to provide, a residence worth \$5000. For this he intended to deduct the equivalent. When he revoked the other legacies he found at his disposal the amount of them and this \$5000, and he disposed of it to his wife and children, and his brother, and Mrs. Baldwin, as the objects for whom he most cared. He did it in general terms which best expressed his object, and which obviated the necessity of calculation.

As to the disposition of the residue of the estate after payment of these legacies, it must be divided among them in proportion to the amount of each after this disposition of the \$7000 added to them by the codicil.

The proportion of the \$7000 and of the residue of the estate to be paid to John C. Hayes, must be calculated upon \$10,000, that being the amount to which his legacy is reduced by the codicil.

PEAKE and others *vs.* LABAW and wife.

A mere accommodation note or accommodation endorsement by a married woman, is not sufficient to create a charge upon her separate estate.

This cause was heard upon bill and answer. The object of the bill was to charge upon the separate estate of the defendant, Hester J. LaBaw, the amount due upon a promissory note given by her husband, and which she endorsed at his request. She made no other contract, and did no other act than simply to write her name on the note of her husband, at his request, when alone with him at their home. She was not told for what purpose the note was to be used, or to whom it was to be passed.

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Mr. Magie, for complainants.

The bill in this cause is filed by the complainants, merchants in New York, upon a promissory note made by Francis LaBaw to his own order, dated July 12th, 1869, for \$900, payable two months after date, endorsed by Francis LaBaw, and Hester J. LaBaw, his wife.

The object of the bill is to charge upon the separate estate of Mrs. LaBaw the payment of the note so endorsed by her, which was not paid, and was duly protested, and notice given defendants.

The bill charges, and the answer admits the following facts: That Francis LaBaw was largely indebted to complainants; that Hester J. LaBaw was, at the time of endorsing the note, and is now the owner of separate estate, some of which is particularly set out in the bill, held by her under the act of 1852, commonly called the married women's act; that Francis LaBaw procured his wife to endorse this note for his accommodation, and for the purpose of transferring it to the complainants; that he delivered it to the complainants to take up his own two checks, then over due and protested, and which were given to complainants by him for money or credit loaned. The answer claims further, that neither at or before the making or endorsing of the note, or at or before the delivery of it to complainants, were any words used, either between themselves, or between them and the complainants, indicating any intention on the part of Hester J. LaBaw to charge her separate estate with the payment of the note she endorsed. Since this part of the answer is responsive, and the note was delivered to one of the complainants *alone*, the case is set down on bill and answer.

The power of the Court of Chancery to charge upon the separate estate of married women, the payment of certain claims, is well established. That power has been held to extend to estates created under the act of 1852, in the same manner as to estates held in trust for the separate use of :

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l woman at common law. *Wheaton v. Phillips*, 1 21; *Johnson v. Cummins*, 1 *C. E. Green* 105.

jurisdiction of this court in such cases cannot be ed, unless it may be said to be taken away by a being provided at law, by act of 1862. *Nix. Dig.* Such a remedy is provided as to debts contracted by ed woman, in the purchase of property, or transac- business by her. *Eckert v. Reuter*, 4 *Vroom* 266. in this case, no *such* debt was contracted. The ment was for accommodation. In the case of *Van-Skillman*, decided by the Supreme Court, at Febru- rm, 1870, opinion by Chief Justice Beasley, the was against a married woman, upon her accommoda- dorsement of a promissory note; and the court held, e case was not within the law of 1862; that an odation endorsement was not such a debt as, by the f that statute, could be the foundation of an action at inst a married woman.

Supreme Court having, in an exactly similar case, d jurisdiction, and denied that an action could be t at law, it is plain there can be no objection to the tion of this court in this cause, upon the act of 1862. n: the answer admits, that at the filing of the bill, LaBaw had been adjudged to be a bankrupt. Under of 1862, a suit at law on this note would involve a n him, and a judgment against him. *Quære*. Could suit have been brought after he was adjudged bank-

Would not the injunction of that court have been y used to restrain it? To this bill, which is a pro- ; not *in personam*, but *in rem*, against Mrs. LaBaw's e estate, no such objection can be made.

effect of the act of 1852 having been to cause a roportion of the property of the state to be placed in nds of married women, it has seemed a matter of to extend the remedies against them. This is shown ases in this court, to which reference will be here- ade, particularly the case of *Wheaton v. Phillips*, 1

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Beas. 221. It is further shown by the act of the legislature of 1862, making married women liable to an action at law for certain contracts and engagements. And it is respectfully submitted that this case at once shows that not only equity and good conscience, but a sound public policy, require that all the remedies against married women, which can be shown to be within established principles, should not only be retained but liberally administered; the remedy applied for in this case, can be shown to be within established principles.

I. A married woman, by making or endorsing a promissory note, by implication equitably charges her separate estate with its payment, without any words expressly referring to her separate estate.

If there can be any charge created by her upon her separate estate, it is unreasonable that the making or endorsing of a note which can be paid in no other way, should not be held to be such a charge.

For some time the jurisdiction of courts of equity in such cases was put upon the ground that a married woman's contract or engagement was an equitable appointment of her separate property to pay it. That notion is now exploded and it is held now to be a contract, not enforceable at law, nor personally, but equitably upon her separate estate. In the words of Chancellor Green, (*Johnson v. Cummins*, 1 *E. Green* 105): "The jurisdiction in this state is not on the ground of the married woman's estate being an equitable estate, but on the ground of its being *her separate estate equitably subject to contracts entered into by her*, which are not binding upon her personally, and which cannot be forced at law." Upon this principle, which accords with all the recent authorities, no express charge is necessary, but separate estate being proved, and a contract, not enforceable in any other way, then the court obtains jurisdiction by the implied charge upon the separate estate. 2 *Story's Eq. Jur.*, §§ 1399, 1400, and notes 1 and 2, 14

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In the last section the following language is used: "If she gives a promissory note, or an acceptance, or a bond to pay her own debt, or joins in a bond with her husband to pay his debt, the decisions have gone the length of charging it on her separate estate, without any distinct circumstance establishing her intention." *Willard's Eq. Jur.*, .651; *Schouler on Domestic Relations*, pp. 220, 221, 222 and 224.

In England, this doctrine has been well settled since the leading case of *Hulme v. Tenant*, 1 *White & Tudor's L. C.* 11, marg. p. 394. See also the large number of cases to the same effect, on p. 509, marg. p. 404; and particularly, *Prosser v. Church*, 3 *Deav.* 485, 489; *Bullpin v. Clark*, 17 *Ess.* 365; *Owens v. Dickenson*, 1 *Cr. & Phil.* 48.

In the last case, Lord Cottenham used the following language: "The holder of her (a married woman's) promissory note has her contract, which equity considers her capable of entering into; and it would be a very strong proposition to say that when she has, by an instrument under her hand, acknowledged her debt and promised to pay it, she is not considered as creating an obligation to bind her." See also, *Laughan v. Vanderstegen*, 2 *Drewry* 165; *Shattock v. Shattock*, *Law Rep.*, 2 *Eq.* 182. In this case Lord Romilly used this language: "There are two classes of cases: first, where a married woman has an absolute interest in the property settled to separate use; secondly, * * * * *

In the former case the law now, as administered by the courts of equity, seems to be settled to this extent: that her separate property will be liable to pay any debts of hers which she has secured by writing, the courts holding, that giving such a writing must have a meaning, and that unless the meaning be to charge her separate estate there is no meaning whatever in the writing, which is a mere piece of waste paper." See, also, *Mrs. Matthewman's Case*, *Law Rep.*, 3 *Eq.* 781; *Murray v. Barlee*, 4 *Sim.* 82; 3 *Mylne & Keene* 220, &c. The language of Lord Brougham in this

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case, is quoted in support of this doctrine in 1 *White & Tudor's L. C.*, p. 511, marg. p. 406 and 407.

In Hare & Wallace's Notes, 1 *White & Tudor's L. C.* 533 and 534, are numbers of American cases taking this ground, and reference is particularly made to the well considered cases in Kentucky, quoted on page 534 and *seq.*

In New Jersey the following cases seem to involve the same principle :

Leaycraft v. Hedden, 3 *Green's Ch.* 512. In this case the bill was filed on a bond of the trustee of a married woman, made for her. It had originally been secured by a mortgage, but the mortgaged premises being sold under foreclosure, there was not enough realized to pay the bond, and the bill was filed to charge the separate estate of the married woman with the payment of the balance, and it was so decreed. This clearly involved the principle. The mortgage of part of her separate property, was evidence that she did not intend to charge *expressly* all her separate property. That was charged simply by implication from the making of the bond.

Pentz v. Simonson, 2 *Beas.* 232, was a case of money paid to a married woman on her contract to sell some of her separate estate. Court refused to compel her specifically to perform the contract, but held that her separate estate was liable for repayment of the money paid. page 236, Chancellor Green says: "She is in equity much bound to repay the sum thus advanced as though had given her bond or note for the repayment of money." The charge upon the separate estate was wholly by implication.

Wheaton v. Phillips, 1 *Beas.* 221. Chancellor Williamson held that a married woman's general debts, contracted in her own business, were charged on her separate estate.

Johnson v. Cummins, 1 *C. E. Green* 97, where the debt was contracted for the benefit of her own estate, Chancellor Green held "that equity will, in such a case, charge the separate estate of a *feme covert*, without any express appropriation."

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f her estate, or any part of it, to the payment of the debt ;" and "that all that is necessary to bind the separate estate that it appears that the engagement was made in reference to the estate, or upon the faith and credit of her state." p. 104.

The last case establishes, in this court, the law, that a charge on a married woman's separate estate will arise without any express words; certainly, whenever her engagements were for her own benefit or benefit of her estate, or on the credit of her estate.

II. A married woman, by endorsing a note for the accommodation of her husband, by implication charges her separate estate.

This follows, I submit, as a necessary consequence, from the principle on which equity acquires jurisdiction in such cases, viz. that in no other way can her engagement be enforced. Unless conceded, a long and well established privilege of a married woman, in respect to her separate property, is taken away from her. It has long ago been held that a wife may give her separate estate to her husband. See cases cited in 1 *White & Tudor's L. C.* 515, Marg. pp. 411 and 412.

So, in *Jaques v. Methodist Episcopal Church*, 17 Johns. 548, it was held that a married woman might dispose of her property to her husband, so that her disposition of it was free and not the result of flattery, force, or improper treatment. *Hardy v. Van Harlinger*, 7 Ohio N. S. 208. And so in *Galway v. Fullerton*, 2 C. E. Green 389, it was held that a wife might mortgage her separate property to secure the debt of her husband.

It is respectfully submitted that no reason can be assigned for restricting the wife's power to select her own way of disposing of her property for her husband's benefit; provided always, she be not under any coercion from him. And it is suggested that the reason why the legislature, in giving an action at law against a married woman upon

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some of her contracts, omitted contracts of suretyship, was that a court of equity might, from its peculiar powers, take care that a wife was not deceived, coerced, or defrauded in such a disposition of her property.

I insist, therefore, that the charge of an accommodation endorsement of a married woman does not differ from any charge for the benefit of her estate. Such a note is evidently made upon the credit of her estate, and so comes at once within the words of Chancellor Green in *Johnson v. Cummins*, quoted above. 2 *Story's Eq. Jur.*, § 1400; *Field's Eq. Jur.*, p. 649; *Schouler on Dom. Rel.*, p. 225.

And such engagements of married women have been constantly enforced in the English courts of equity, beginning with the leading case of *Hulme v. Tenant*, where the bond, which was the subject of that suit, was for the husband's debt. See also cases cited in 1 *White & Tudor's L. C.* 515, marg. pp. 411 and 412.

Field v. Sowle, 4 *Russ.* 112, was a case where a wife joined in a bond for money advanced to her husband. *Stanford v. Marshall*, 2 *Atk.* 68, was a case of a bond for money lent the husband. *Heatley v. Thomas*, 15 *Ves.* 596, was a case of a bond by a married woman as surety for her husband. *Wagstaff v. Smith*, 9 *Ves.* 520, assignment of a married woman to secure annuity to husband.

In this state, the question has not been directly decided. In *Vankirk v. Skillman*, decided by Supreme Court in February Term, 1870, it was assumed that a married woman's accommodation endorsement would be good in equity.

In *Oakley v. Pound*, 1 *McCarter* 178, a case in which F. B. Chetwood was counsel for complainants, and Chancellor Williamson for defendants, the bill was filed upon notes of a married woman, given partly for a debt of her husband owed to the complainant; no objection of this kind was made by the acute counsel for the defendant, and Chancellor Green, in his decision, though he mentioned the fact that she gave the notes for her husband's debt, never intimated that there could be any defence on that ground.

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A different rule from that insisted upon above, has undoubtedly prevailed in New York since the case of *Yale v. Dederer*, 18 N. Y. 265, and 22 N. Y. 450. The principle of the case as last decided seems to be, that to create a charge on a married woman's separate estate, the intention to charge must appear in the contract itself, or the consideration must enure to the benefit of her separate estate. That this decision was completely at variance with the former decisions in New York, is admitted. It has not been followed elsewhere, except in Massachusetts, and the principle on which the decision was founded, has been severely criticised. See particularly *Schouler's Dom. Rel.*, pp. 229 and 230, and an able discussion by I. F. Redfield, *American Law Reg.* for 1861 and 1862, Vol. 1, N. S., p. 665.

But this case of *Yale v. Dederer*, seems to be cited with favor in *Armstrong v. Ross*, 5 C. E. Green 109. I submit, however, that nothing in the case of *Armstrong v. Ross*, intimates that the Court of Chancery is disposed to adopt all the rulings of the case of *Yale v. Dederer*. To so much of it as is contained in the first proposition assumed as settled by the Chancellor, no objection can be made. But I insist, that while it is true that a married woman's debts contracted for the benefit of, or on the credit of her estate, will be charged thereon, it is equally true, that her power to devote her estate to her husband's advancement (always excepting the case of coercion on his part), and her doing so, by the making or endorsing of a note for his benefit, which note can be paid in no other way than by being charged on her separate property, have never yet been denied, and I believe never will be denied by a court of equity in New Jersey. To limit her liability in this direction is, I submit, what the legislature has never undertaken to do; and since that power has been, as I believe is shown above, exercised for a long series of years, no court should undertake to limit it, until some legislative restriction is put upon it.

As to the other branch of the *Yale* and *Dederer* decision, viz. that the intention to charge must appear in the contract

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itself, it is so contrary to the numerous decisions in New Jersey that it cannot be adopted here without a marked inconsistency. For example, it has been repeatedly decided and even in the case of *Armstrong v. Ross*, that a mortgage made by a married woman, which is utterly void by reason of the husband not having joined in it, will charge, *not the mortgaged premises alone, but her separate estate in general*. The intent to charge her separate estate appears in the contract, to effect only the specific portion described in the mortgage. And yet it is held, and with manifest justice that it should be charged upon her whole separate estate.

I submit then, that both from principle and from a great weight of authority, this court should hold that by this accommodation endorsement, Mrs. LaBaw impliedly charged her separate estate.

Some questions may arise upon the mode of relief. In the English cases, it seems admitted that the relief is by a receiver to take the profits of the separate estate and apply them to the debts.

The decree in *Yale v. Derderer*, 21 Barb. 290, ordered the separate estate sold.

The reason of the English cases seems to be, that in most cases of separate property at common law, there was a remainder to heirs, &c.

Since our act of 1852, we insist there is no reason why the *corpus* of the separate estate may not be used to pay her debts, as well as the profits. So Chancellor Green seemed to think. See *Johnson v. Cummins*, 1 C. E. Greens 104, 105.

If otherwise, we are entitled to a receiver and relief from the profits, under our prayer for general relief.

Mr. F. B. Chetwood, for defendants.

The defendants both deny the whole equity upon which the complainants seek to charge the separate estate of the defendant, Hester J. LaBaw.

By the answer of Francis LaBaw, it appears on the 12th

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of July, 1869, at his place of business in Rahway, he drew up the promissory note in question, of \$900, and went to his dwelling-house, and asked his wife, the said Hester J. LaBaw, to endorse her name on the note for his accommodation, and she did so; and Francis LaBaw immediately upon getting the endorsement of his wife's name on the note, left his house to take the next train of cars to the city of New York, to call upon the complainants and to offer them this note; that he delivered it to W. J. Peake, one of the complainants, who accepted it; that when he delivered it to him nothing had ever been said, nor any conversation ever had, by or between him and the complainants, or any one of them, on the subject of his wife's endorsing the note, or any other note, or in any way or manner becoming security for said debt, or for him, nor on the subject of pledging, or in any manner charging her property, or any part of it, as security on said note, or for said debt, or rendering the same in any manner liable therefor. He also denies that he ever proposed to the complainants, or any of them, that his wife would charge her own property, or any part of it, with the payment of \$900, or any other sum to complainants, or endorse a note for that purpose.

The defendant, Mrs. LaBaw, says she never authorized her husband to offer or say to the complainants, or any of them, or to any person, that she would charge her separate estate, or any part of it, with the payment of any sum of money to the complainants, or any of them, nor with the payment of the said promissory note of \$900, or any other note; and denies that she endorsed the note in question for the purpose or object of charging her separate estate, or any part of it, with the payment of said note, or with the payment of the debt for which the note was made; and that she endorsed the note only because her husband asked her to put her name on it, without giving her any reason or stating to her any purpose for her endorsing it.

They both expressly deny that she endorsed the note for the purpose, and with the design of charging, or that she did

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thereby charge her own separate estate, and the lands and premises in the bill mentioned, with the payment of the money in said note specified.

Both defendants say that Francis LaBaw never asked or proposed to his wife to pledge or charge her separate estate or any part of it, for the payment of said note or the said debt, or any part of it, and there was never any conversation between them on the subject of her so pledging or charging her estate, or any part of it, or of her endorsing said note for the purpose, or with a view to pledge or charge her separate estate, or any part of it, with the payment of said note.

The defendant, Hester J. LaBaw, is an endorser of the note of her husband, at his request, without any interest in the consideration for which her husband made the note for his debt, and without any knowledge or information of the object or purpose, or effect of the note, and has derived no benefit therefrom, and never can derive any. She endorsed the note only because her husband asked her to put her name on it, without giving any reason for so doing. Under any circumstances in the case, she is, at most, a mere accommodation endorser.

I believe that no decision, dictum, or intimation can be found, to charge the separate estate of a married woman with the payment of the debt of her husband, upon her endorsement of his note at his request, without any other fact or circumstance connected with her endorsement beyond asking her to put her name on the note.

In this case there is no knowledge or information on the part of the wife, of the object of the note, or of her endorsement; and there is an entire absence of any intention on her part by endorsing the note, that the endorsement was made to operate in some way, or in any way, and therefore, no intention to charge her separate estate, and more especially that portion of it particularly described in the bill.

Where a wife becomes a party to an accommodation note as surety merely, her separate estate is not liable for the

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payment of it, unless she expressly charge it for that purpose. 2 *Story's Eq. Jur.*, § 1401; *Willard v. Eastham*, 15 *Gray* 328.

— In the case of *Tullet v. Armstrong*, 4 *Beav.*, the judge says :
“ But in a case where she enters into no bond, contract, covenant, or obligation, and in no way contracts to do any act on her part; where the instrument which she executes does not purport to bind or pass any thing whatever that belongs to her; and where it must consequently be left a mere inference whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note, or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate.”

The bill was filed December 4th, 1869, and on the 29th of January, 1870, the complainants proved the note in question as a debt against Francis LaBaw, who had been previously forced into bankruptcy, and in said proof in bankruptcy one of the complainants swears that this note was endorsed by said bankrupt's wife, “ but the value of such endorsement, or her responsibility therefor, this deponent is unable to state.”

This does not well comport with their statements in the bill of complainant, that she has a separate estate and charged it with the payment of this note, but agrees with the answer of both defendants in relation to her responsibility therefor.

THE CHANCELLOR.

The separate estate of Mrs. Labaw was the legal title to land held by her by virtue of the married women's act. She had the legal title, and there was no trust in any one. And the only question in the case is, whether a simple endorsement of a note by a married woman is such charge upon her separate legal estate as will be enforced in equity.

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Before the married women's act, legal estates in fee could be held and were held by married women. The making or endorsement of a note, or executing a bond or mortgage, could not bind it either at law or in equity, without the separate acknowledgment directed by statute. The married women's act did not, in terms, change this; it was not intended to change it. No change was required to give effect to any provision of that act. The proposition that the owner of property must have, as an incident to the ownership, the right to charge and encumber it, applied to legal estates held by married women before that act, but did not have the effect contended for.

Since the passage of that act here, and similar acts in other states, the courts have held certain contracts of married women, to create charges on their separate estates, which will be enforced in equity. This was in analogy to the doctrine of equity, by which certain contracts made by married women having estates held in trust for them, were enforced in equity as against their trust estates. Debts contracted by them were paid only out of the income of these estates for the life of the woman.

The courts of this country have declared the estates of married women held under these acts, to be liable for debts contracted by them for the benefit of these separate estates, or for their own benefit on the credit of these estates. But they go no farther than this. The Court of Appeals in New York, in the final decision in *Yale v. Dederer*, 22 N. Y. 450, holds this to be the limit of the power of a married woman to charge her estate, unless done by an instrument properly executed for that purpose. The same doctrine is held by the Supreme Court of Massachusetts in *Willard v. Eastham*, 15 Gray 328. Chancellor Green, in *Johnson v. Cummins*, 1 C. E. Green 104, says: "It must be assumed that the wife had a separate estate, which she might lawfully charge with debts created for the benefit of the estate, or for her own support and benefit;" and again, "In order to bind the estate, it must appear that the engagement was

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made in reference to and on the faith and credit of the estate."

In the case of *Armstrong v. Ross*, 5 *C. E. Green* 109, this court took the same view of the subject, and although it was not declared that the estate could not be made liable in any other way, the means of making her estate liable are stated in such manner as imply that they are the limit of the power.

I am of opinion that the separate estate held under the married women's act, cannot be made liable to be charged in equity by an accommodation note, or an accommodation endorsement made by her. The courts have gone far enough in construing these acts as removing disability of coverture, and I am not willing to take another step in that direction. All the protection given by the law to a married woman on account of her disability or being under marital influence, will be taken away, if it is held that becoming security for the act of another, or signing accommodation paper, will bind and take away her separate estate.

The bill must be dismissed.

THE ERIE RAILWAY COMPANY vs. THE DELAWARE, LACKAWANNA AND WESTERN, AND THE MORRIS AND ESSEX RAILROAD COMPANIES.

1. Where two railroad companies have the authority to build and run a railroad between the same termini, neither can take exception to any irregularity or unlawfulness in the exercise of such franchise by the other, unless it can show a particular injury to itself from such course.

2. Where a party stands by and encourages another in the construction of a public work, at great cost, this court will not interfere with it at his instance. Such conduct estops him from calling in question the legality of the structure.

3. Where a railroad company appropriated land under a belief that they were the owners of it, and the land appeared to be of no particular value

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to the owners, this court, in the exercise of its discretion, refused to restrain them from its enjoyment.

Quære. Whether this court will prevent, by injunction, the permanent appropriation of lands by a railroad company acting *ultra vires*, in the absence of irreparable injury.

4. Where a railroad company have irregularly taken lands, but have the capacity to acquire title, this court will not, where the advantage to the complainants would be small, and the injury to the company incalculable, interpose and stop the running of the cars on such road until the statutory method of acquiring title can be executed.

5. When the title to the lands the use of which the complainants seek to enjoin is in dispute, this court has no jurisdiction. In such case, an injunction is never granted to prevent the enjoyment of the property in dispute by either party who happens to be in possession of it.

6. A court of equity will never lend its active aid to a party who, by superior knowledge and artful silence, has gained an unfair advantage over another.

This cause was argued upon bill and answer, before Beasley, Chief Justice, sitting for the Chancellor.

Mr. E. T. Green, Mr. J. P. Stockton, and Mr. Gilchrist Attorney-General, for complainants.

Mr. Vanatta, Mr. C. Parker, and Mr. Williamson, for defendants.

THE CHIEF JUSTICE.

The argument in this case occupied a week, but learned as it was, it has failed to satisfy me that there is any difficulty, either in ascertaining the legal principles pertinent to the controversy, or in making the proper application of those principles. The facts of the case, so far as relates to the present motion, are briefly these :

The complainants are the Erie Railway Company. The bill sets forth the title of this corporation to a railroad from the city of Paterson to the city of Hoboken, in this state, and that it has been for some time past in the peaceable occupation and use of such road. I shall assume for present purposes, that this title is properly pleaded, and that the

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Complainants are lawfully invested with the franchise claimed.

It further appears, that the road in question runs through a tunnel which has been cut through Bergen Hill, in Hudson county, near Hoboken. In this tunnel two railway tracks are laid, each adapted to cars of a wide or narrow gauge. The complaint is, that the Morris and Essex Railroad Company, or their lessees, the Delaware, Lackawanna and Western Railroad Company, have built, without authority of law, a branch railroad, which is called in the pleadings the Boonton branch, and which, running through Paterson to Hoboken, forms a competing line between those cities with the road of the complainants. The bill also complains that this branch road has been laid over a certain tract of land, the property of a certain corporation styled the Long Dock Company, of which the complainants are the lessees, without the defendants having acquired any title to, or interest in such land. The complainants further show, that the defendants have recently constructed wide gauge tracks over this Boonton branch, and that they attempted to connect, by force, these tracks with the broad gauge tracks of the complainants at the Bergen tunnel.

Upon the filing of this bill, a temporary injunction was granted, restraining the defendants from making this connection, and upon the present occasion the endeavor is to continue that injunction.

To this bill the defendants have put in an answer of great length, setting up their right to build this Boonton branch by force of several successive legislative acts. They likewise show that the Bergen tunnel was built by and upon the land of the Long Dock Company, with the consent of the New York and Erie Railroad Company, who were the predecessors of the complainants, and that said Long Dock Company granted to the Hoboken Land and Improvement Company, and their assigns, the right to the use of the tunnel, without paying toll for such privilege, for a certain period of time not yet elapsed. That this Long Dock Com-

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pany were the owners of lands lying to the west and east of such tunnel, and that they also granted to the Land and Improvement Company and their assigns, a right of way for a railroad with two tracks over such lands. These rights, it is shown, have passed by assignments to the defendants, the Delaware, Lackawanna and Western Railroad Company. As to the complaint of having laid the Boonton branch in part over lands of the complainants, the reply is, that the defendants purchased such land of the Long Dock Company with the assent of the complainants; and that if the conveyance thus obtained does not embrace such land, the omission was occasioned by the fraud of the complainants.

This is the general scope of the allegations of the parties, and the foregoing statement will, I think, be sufficient, in connection with such other facts as may be incidentally noticed, to make intelligible the views which I am about to express upon the case in its present aspects.

It thus appears that the first wrong of which complaint is made is, that the exclusive franchise of the complainants of possessing a railroad and carrying goods and passengers thereon from Paterson to Hoboken, has been infringed by the defendants. The claim is, that the complainants have a grant from the legislature to construct and run a railroad between these termini, and that the defendants have no such authority, but have established a road between these cities by a perversion and in fraud of the statutable powers conferred upon them. If affairs were purely in this condition the position would be well taken. In the case of the *Raritan and Delaware Bay Railroad Co. and others v. The Delaware and Raritan Canal, &c.*, 3 C. E. Green 546, it was decided by the Court of Errors in this state, that the right to build and use a railroad for the public use is a franchise the right to which can be derived from the state only, and that such franchise is exclusive except against the government, and that a competing road made without legislative authority will be enjoined. I have assumed that the complainants are the lawful possessors of such a franchise, and

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consequently, **against** such claimants the defendants are bound to show a right, either legal or equitable. They have attempted to do both. The legal right which is thus adduced, consists in sundry legislative grants contained in the charter of the Morris and Essex Railroad Company, and in the supplements to such charter. But I shall not at present undertake to construe these various and somewhat obscure statutes, for I do not find it necessary from any present exigency, to pass definitely on the legal title thus asserted by the defendants. I may say, however, that I do not consider it at all clear, that even resting the argument on the grounds of strict law only, the complainants would be entitled to prevail on this point. It is true, that I am far from being convinced that the defendants had the right to run their branch road in the way in which they have done, directly to the city of Paterson, instead of passing aside of that place, through the Great Notch, which is the statutory point called for in the supplement to the charter which is relied on in this respect. I think the legal propriety of this act is dubious. But still, even admitting this to be a deflection from the line prescribed, if the defendants are right in their claim, that if they had run through the Great Notch, on the course indicated in the statute, they could lawfully have gone to a point in a straight line extending from Paterson to Hoboken, and thence to the city of Hoboken, and then could have connected the road so formed with the city of Paterson by a spur, I think it quite obvious the complainants cannot object to the road at present established. This results from the fact that the deviation to Paterson, as it now exists, would not in such a condition of things, even if unauthorized, injuriously affect the complainants. The substantial question on this head between these parties must be, whether each has the authority to build and run a road between these points, for if each has such authority, neither can take exception to any irregularity or unlawfulness in the exercise of such franchise, unless it can show a particular injury to itself from such course. But, as I have before

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remarked, no final opinion touching the legal title of the defendants to construct their line of railroad will be expressed at this stage of the cause. It is proper, however, to observe, as the consideration has an important bearing on the topic on which I am next to enter, that this claim of a lawful title by the defendants has at least too much of substance in it to leave them exposed to the suspicion that they have, with their eyes open, acted in fraud of their charter, or have willfully trespassed on the rights of the complainants. The attempt was made to give such an unfavorable color to their conduct in this particular, from the circumstance that in the year 1869 a bill was discarded by the legislature, which contained express authority to build the branch in question as it has been built; but I think a fair interpretation of that transaction is, that the defendants, from motives of prudence, endeavored to procure this statute, in order to remove all uncertainty as to the extent of their power. Such an effort is not at all inconsistent with entire good faith and an honest conviction that they were possessed of the legal ability to lay the road in question. They allege that in this affair they acted with caution and upon the advice of legal counsel, and there is no circumstance which throws any suspicion over this assertion. However infirm, then, their legal title may be, I do not perceive anything in this act of the defendants, which ought to impair, in any degree, their standing in a court of equity.

My reason for thus postponing all ultimate consideration of the legal status of this branch road of the defendants, is because, on the concession even of its unlawfulness, I do not think the complainants are in a position to challenge such status before this court. In my opinion, the complainants have lost this right by their own acquiescence and laches. Indeed, when the pleadings were first read, I thought I perceived that the *locus standi* of the complainants on this point was missing, and I listened with attention for some suggestion or explanation of counsel, but no circumstance was pointed out supplying this insufficiency in the case made

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by the bill. The defect seems to me fundamental. I know of no principle of equity better settled than the rule applicable to this matter, nor does it seem possible for any facts to be more obviously within the reach of such principles. The case is this: the complainants claim the exclusive right to a railroad between the cities of Paterson and Hoboken; they stood by and saw the defendants build, within sight of their own road, a rival parallel road this whole distance, at a cost of many millions of dollars; they expressed no dissent and gave no warning; and finally they sold, for a large sum of money, a part of their own land to help the construction of this road, which, it is now claimed, has no rightful basis whatever. In my estimation, these facts are amply sufficient to debar the complainants from ever calling in question the lawfulness of this structure, which has been erected, not only through the passiveness of the complainants, but by their active assistance. This is not one of those cases in which it is lawful for a party to wait to see if a nuisance will work a special injury to himself or his property. At no time from the commencement of the work could its effect have appeared uncertain to the complainants; the course of the road was clear and avowed; the survey was on file; and the building of every foot of the structure, if unauthorized, was an invasion of the franchise of the complainants. If the complainants intended to contest the right of the defendants, why was not prompt action taken before this enormous outlay was made? Fair dealing and good conscience obviously required the complainants to assert their right at the outset, if it was designed ever to do so. By this course they could have secured themselves in all their privileges without inflicting any irreparable loss on the defendants. No excuse seems to exist, nor has any reasonable explanation been given, for this delay. From the conduct of the complainants, the defendants could fairly infer that there was no intention to object to the course they were pursuing, and after action has been based on this fair presumption, and great expense has been incurred, it is altogether too late

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for opposition to be tolerated from the party so having acquiesced and encouraged. This is an equitable rule, which is applied in a great variety of cases, and indeed in every instance in which a complainant is seeking to enforce a stale equity. Laches and neglect are invariably discountenanced in this court, it being the common maxim that nothing will put its powers in action but conscience, good faith, and reasonable diligence. The rule is an ancient one, (see the case of the *Watercourse*, 3 *Eq. Cases, abridged*, 522, pl. 3,) and has been enforced in a large number of adjudications. As an example of the clear exposition and correct application of this doctrine, I refer to the case of the *Rochdale Canal Company v. King*, 16 *Beav.* 630. By a Canal Act, mill owners were empowered to use the canal water for condensing steam. The defendant applied to the company for leave to take water for generating as well as condensing steam. The company neither assented to nor refused his application, but the pipes were laid in the presence of their engineers. The mill being built on the principle of using the canal for both purposes, the Court of Chancery, although the plaintiff's rights had been established at law, held that they were bound by their acquiescence, and refused a perpetual injunction from taking water for the purpose of generating steam. The equitable rule was thus stated by Samuel Romilly, Master of the Rolls: "The principle which the defendants rely is often recognized by this court, namely, that if one man stand by and encourage another though but passively, to lay out money, under an erroneous opinion of title, or under the obvious expectation that an obstacle will afterwards be interposed in the way of his enjoyment, the court will not permit any subsequent interference with it by him who formerly promoted and encouraged those acts of which he now either complains or seeks to obtain the advantage."

I have already said that the complainants encouraged the building of the road in question, both actively and passively, and the consequence is, that the rule above cited applies to

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them with full force. That this principle is completely established in this court and is constantly enforced, will appear from the following cases. *Dann v. Spurrier*, 7 Ves. 231; *Powell v. Thomas*, 6 Hare 300; *Greenhalgh v. Manchester Railway*, 3 My. & Cr. 784; *Norway v. Rowe*, 19 Ves. 144; *Hart v. Clarke*, 6 De G. M. & G. 232; *Harryman v. Collins*, 18 Beav. 11; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91.

From the application of this equitable rule to the case before me, the result is, that I must hold that the branch road of the defendants, called the Boonton branch, is, as it respects the complainants, a legal structure, and this without any reference to the question whether or not it conforms to the power conferred upon the defendants or their assignors, by the legislature.

The claim for an injunction, therefore, cannot rest on this ground.

But, on the argument, a second ground for an injunction was pressed, which was that certain land of the complainants had been unlawfully taken by the defendants, and was being used for the purposes of this branch road.

The land referred to is a small strip, about twenty or thirty feet wide, lying along the main track of the defendants at the point at which the Boonton branch seeks its junction with such main track. The defendants have laid both their broad and narrow gauge tracks over this strip of land, and have thus connected their branch road with their main track at a point about thirteen hundred feet west of the Bergen tunnel.

It appears from the undisputed testimony in the case, that the defendants have had for some time past, this piece of land in their possession, and have been and now are running their cars over it, on the track with the narrow gauge. It was not pretended on the argument, nor is there the faintest color for such a pretence, that in taking possession of this land the defendants were aware that they were infringing the rights of the complainants. They supposed

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that they were the owners of the land; so that if the case be taken most strongly against them, they must be regarded as having appropriated it under a misconception of their right; they are not willful trespassers. And the question thence arises, whether, under these circumstances, this court should, in the exercise of its discretion, restrain them from the enjoyment of this property. The ordinary rule is, that a mere trespass upon real estate does not give jurisdiction to this court, but, in order to have that effect the trespass complained of must be attended with some irremediable mischief. The modern English doctrine, however, appears to be, that a court of equity will not permit the permanent appropriation of lands by a railroad company acting *ultra vires*, but will prevent such appropriation by the use of its prerogative writ. From the cases heretofore decided in this state, it is not entirely clear that the preventive power of this court has so wide a scope.

But waiving this question, and assuming the English rule to subsist here in full force, I have yet failed to see the propriety of extending to the complainants, on this ground, the relief which is asked. The case does not show that the land which has been taken is of any peculiar value, and from its location it seems unfit for convenient use except by the defendants.

I have already concluded that the right of the defendants to this Boonton branch is not to be controverted; and the consequence is, they have the capacity, if they have at present no title to these premises, to proceed and acquire such title under the provisions in their charter. Under these circumstances, I should regard it as a most arbitrary and improvident exercise of the prerogative of this court to interpose and stop the running of the cars on this great thoroughfare, until the statutory method of acquiring title to this land could be executed. From such a step the advantage to the complainants would be slight, but the injury to the defendants incalculably great.

If the defendants have no title, all that the complainants

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can ultimately recover is an equivalent in money for this land, and this can be readily realized by an action at law, which would compel the defendants to acquire title by a condemnation of the property. There is, therefore, no imperative demand for the intervention of this court; at all events, the disproportion between the benefit to the complainants and the injury to the defendants, which would follow from granting an injunction, is so great as to forbid, in a very strong manner, the exercise of such an authority, and more particularly at this initial stage of the proceedings. Even if it had appeared that the land had been taken willfully and against the known rights of the complainants, I should still have hesitated long on account of the unnecessary waste of property that would ensue, before applying, in the present condition of things, this summary remedy. I have not been pointed to any precedent which would appear to justify, in the most distant degree, the course I am asked in this case to take, and I should be surprised to find that any such precedent existed. If, therefore, the title of the complainants to this land in question had appeared to be uncontested, I still should have been compelled to refuse an injunction founded on the unlawful appropriation of it by the defendants; but, as the proofs before me show, the fact is that the title of the complainants to this land is not uncontested. The defendants themselves claim title to it; and they allege the existence of the following facts: that this piece of land was the property of the Long Dock Company, and was part of a large tract over which they, the defendants, claim to have a right of way for a railroad with a double track. The extent of this easement with regard to the width of the strip of land which it embraces, has never been defined; and the defendants claim that it comprises within its bounds the small tract in controversy. This is denied by the complainants. Recent letters of the President of the Erie Company, show very conclusively, that the territorial bounds of this easement, claimed by the defendants, have never been ascertained. The case also shows

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that the defendants have, for some years past, been in the peaceable occupation of a part of the very tract in dispute, and that they have used other parts of the larger tract for one of their bridges, to an extent which is unwarranted, unless their legal rights in the premises are co-extensive with their present claim. From these facts, it certainly appears that the title on which the complainants rest their application for an injunction is fairly in dispute, and that fact alone is sufficient to oust this court of its jurisdiction over this branch of the case. Under such circumstances, an injunction is never granted to prevent the enjoyment of the property in dispute, by either party who happens to be in possession of it. A disputed title is not a proper ground for an injunction.

But there is also a third objection to the complainants' application, founded upon the supposed ownership of this property, which, I think, is equally fatal to it. There are certain circumstances connected with the defendants' possession of the premises in question, which must operate in the nature of an equitable estoppel to prevent the complainants from treating them as trespassers. The circumstances referred to are the following :

It is admitted in the case, that the defendants have a conveyance for the land contiguous to the small tract in dispute. In this deed the Long Dock Company are the grantors, the real and beneficial actors in the transaction were the complainants. When the defendants took that conveyance they did so under the belief that it conveyed to them the land up to the line of the strip of land they were therefore in possession of and were using for their main track. The purpose for which this conveyance was obtained, and the circumstances attending the transaction, are thus stated in the affidavit of Mr. Brisbin, a witness on the part of the defendants: "That he had the entire charge and control in purchasing the right of way for the Boonton branch of the Morris and Essex Railroad; that he applied to Jay Gould, president of the Erie Railway Company, who was a

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president of the Long Dock Company, to purchase the right of way for said branch railroad over the lands of the said Long Dock Company; that he stated to Mr. Gould, that the purpose and object for which he desired to purchase said lands was for the construction of said branch railroad, and he then had some conversation with him as to the price. He (Mr. Gould) requested deponent to go with Mr. Rucker, general superintendent of the Erie Railway, and show him what lands were required, the situation and location of the same, and in pursuance of such desire deponent went upon the ground with Mr. Rucker, and pointed out to him the line of said branch railroad, as there staked out and since constructed upon the ground (which, in the complaint filed in this case, it is alleged the defendants have not title to); that Mr. Rucker and deponent also viewed the place where it was intended to connect, and where the said branch road has since been connected with the main line of the Morris and Essex Railroad, and it was then and there distinctly understood that the object, purpose, and desire, and the only object, purpose, and desire of the Morris and Essex Railroad Company in making the purchase of said land, was for the purpose of constructing said branch railroad and connecting the same with the main line of the Morris and Essex Railroad at the point where it has since been connected." Now it seems to me, if the facts are to be taken as proved, a clear defence on this point is established. The affidavit shows that the defendants, through their agent, pointed out to the agent of the complainants how the tract of land to be conveyed bounded on their land on which was located their main track, and informed him that they desired to make the purchase by reason of such contiguity. The agent of the complainants, by his silence, assented to the truth of the statement as to the location of the respective tracts and as to the fact of their contiguity, and the land was conveyed with that understanding. The defendants then entered and built their works. No one would venture to pretend, that by the force of these facts,

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the defendants could be treated as wrong doers; and I am by no means prepared to say, that after the defendants have changed their situation, by making this purchase and by the construction of their road, on the faith of these facts mutually assented to, the complainants should not be held to be concluded from setting up the existence of a different boundary to one of these tracts and thus depriving the defendants of the principal benefit of the transaction. But however this may be, it is very plain that no such equity can be derived from such an affair as will entitle the complainants to an injunction. And, as it seems to me, these are the facts of the case, upon which my decision on this head must rest, for I do not see anything in the proof which can be said to shake the affidavit of Mr. Brisbin. If that statement were false in any particular it would have been easy to show it to be so, but Mr. Rucker, the agent of the complainants, was not examined, and although Mr. Gould was called as a witness, his attention was not directed to this point; the only attempt to explain this affair is made in the answer of the complainants put in to the cross bill of the defendants, but which is under the corporate seal and not being verified by oath, cannot have any decisive effect. Nor can I think the attempt which is made in the answer to get rid of the equitable circumstances contained in the affidavit of Mr. Rucker, a happy one. It consists in an averment that the only application which was made to the president of the Erie Company was "to purchase a certain specified tract of land; that nothing was said about it being for the purpose of connecting said branch railroad with the right of way of the main line of the Morris and Essex Railroad;" that "the objects and purposes for which it was to be used were not stated, and the president of the company, to whom the application was made, at the time before he conveyed the same, examined the description and ascertained that its conveyance would not give any connection, and it was only after ascertaining that fact, and with that knowledge, that he made the conveyance; that he did

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to intend to give any right of way so as to make said connection, and if said description at that time, would have been such as to have enabled the complainants to have made any connection between the Boonton branch and the Morris & Essex Railroad, he would then have refused to have made such connection." Now it is obvious that this plea, useful for any purpose, has, at all events, this defect, that it tends to establish, not an equitable, but a legal defence. The answer does not deny that Mr. Gould was fully aware that the defendants believed that the deed was to have the opposite effect from that which he knew it would have; nor does it deny that he also knew that the purchase was made for the purpose of making a connection between the branch and main roads; what is denied is, that he was not informed of these things in express terms. It should be borne in mind that this is the answer of the corporation, and not that of Mr. Gould, and it may be that this transaction is susceptible of assuming a different complexion. But when the transaction is here detailed, it is clearly the case of one party allowing another to deceive himself, and gaining an advantage in consequence of such self-deception—a wrong sometimes irremediable at law, but which has heretofore, I think, never been presented to a court of equity as ground for its assistance. A court of conscience regards a contract according to the principles of morals, and will extend and enforce it whenever practicable, in the sense in which the one party knew the other entered into it; and to the eye of such a court there is but a small difference between a false representation expressly made, and a representation which it is evident will be naturally implied from the circumstances of the case. If the Erie Company, through its officers, had assured the defendants at the time of the purchase, that the land to be conveyed extended to a land occupied by their railroad, the deception, if the facts were otherwise, would have been manifest, and no one could pretend that such a transaction could stand; and yet it appears to me the shade of distinction is quite obscure

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between such conduct and the act of standing silent, ~~with~~ a knowledge that the force of the surrounding circumstances, unless counteracted, will have the same effect, and will tacitly introduce the same false suggestions. But **it** is especially certain that this tribunal will never lend **its** active aid to a party, who, by a superior knowledge and **ar** tful silence, has gained an unfair advantage over another. **S**uch triumphs are deemed unconscionable, and are opposed to the general principles of the law.

Upon these various grounds my conclusion is, **that** the application for an injunction in this bill must be denied, and the order heretofore made must be dissolved.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY vs. THE ERIE RAILWAY COMPANY.

1. Under the acts of March 4th and 11th, 1858, (*Pamph. Laws* 203 and 312) the Delaware, Lackawanna and Western Railroad Company **h** ave a right of way through the Bergen tunnel, and the consequent right **t** o connect their tracks with those running through the tunnel.
2. A receiver will not be appointed to supersede permanently the **managers** of a railway, and to take entire charge of the affairs of the road where two railroad companies possess a community of interest in the property in dispute, (as for example, being tenants in common of an easement) this court will exercise judicial control over their conduct towards each other, in order to protect their respective rights.
3. Under the acts of 1858, the Erie Railway Company's trains of description, have the right of precedence over those of the Delaware, Lackawanna and Western Railroad Company through the Bergen tunnel. any unlawful use of this privilege, with a view to embarrass or impede the Delaware, Lackawanna and Western Railroad Company in the use of the tunnel, or the road connected with it, will, upon a proper case being made, be a ground of interference by this court. Such case, however, is not made by the present pleadings.
4. The contract of November 1st, 1859, between the Long Dock Company and the Hoboken Land and Improvement Company, the (grantors of the defendants and complainants respectively,) limits the trains having precedence through the tunnel, to those run in conformity with the time tables.

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rains only, at the present stage of these proceedings, will be
cedence.

art of the regulations of the Erie Company giving preference
irregular trains, enjoined.

pointment of a receiver or manager of the tunnel, refused.

ginal bill* was exhibited by the Erie Railway Com-
compel the Delaware, Lackawanna and Western
Company to pay certain tolls for the use of the
through the Bergen tunnel, of which the first
company are the lessees. It was shown that this
as constructed by the Long Dock Company, which
, on the first of November, 1859, granted to the
Land and Improvement Company, and their
a perpetual right of way over certain lands and
, and through the said tunnel, for a single or double
broad, including the right to use the track in said
rovided that the use by said grantees should not at
be such as to interfere with, obstruct, or delay the
of any trains of the New York and Erie Railroad
, according to such time tables as they should
e to time adopt. The rights of the Long Dock
are now vested in the Erie Railway Company,
se of the Hoboken Land and Improvement Com-
the Delaware, Lackawanna and Western Railroad
r.

ill further showed, that by two several acts of the
re, the first approved on the 4th of March, and the
n the 11th of March, 1858, the said tunnel and rail-
e made a public highway, and free to the passage
comotives and trains on the payment of toll, with a
provision that they should be so regulated as to the
starting, running, rates of speed, and tonnage, as
interfere with the use and occupancy of said railroad

it upon this bill did not come to hearing. The matters in contro-
e adjusted by an agreement between the companies.

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by the New York and Erie Railroad Company, ~~or~~ their assigns. The bill then averred, that the road authorized by the contract was never built, but that the Delaware, Lackawanna and Western Railroad Company are using the tunnel for the purposes of an entirely different road, which ~~they~~ have no right to do, unless on the payment of tolls. That this last named company have constructed a branch to ~~their~~ main road, known as the Boonton branch, that they have ~~laid~~ three rails on each track for the passage of cars of four feet eight and one-half inches gauge, and cars of six feet gauge, and that they claim that the cars coming over said branch shall go through the tunnel under the before mentioned contract, without the payment of tolls. That this claim is unfounded. That the Erie Company have served tin tables on the Delaware, Lackawanna and Western Railroad Company, and requested them to conform thereto, with which request they have not complied, but, on the contrary, run their trains so as to obstruct and delay the trains of the Erie Company. This bill prayed an injunction requiring the defendants to refrain from using the railroad through the tunnel so as to interfere with the use thereof by the Erie Company, and to refrain from the use of the said tunnel, except on the payment of tolls. There was also a prayer for an account, &c.

The Delaware, Lackawanna and Western Railroad Company filed a cross-bill, making the Erie Railway Company the defendants, wherein they complained that the latter company had prevented them, by force, from connecting their Boonton branch road with the broad gauge tracks in the tunnel, and that the said defendants had altered, without their consent, certain regulations for the use of the tunnel which had been established by mutual agreement and which new regulations were unfair and unreasonable, giving a general precedence over the tunnel road to all the trains of the Erie Company. This cross-bill prayed that the Erie Railway Company might be restrained from opposing the connecting of the Boonton branch with the tunnel.

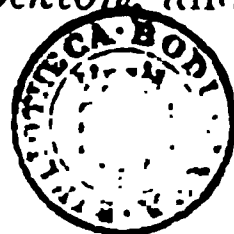
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road, and from enforcing said new regulations, and that if necessary the court should establish a schedule of regulations, and appoint a receiver to see them executed.

The argument came on upon the motion for the injunction asked in this cross-bill, and was heard on the pleadings and affidavits, before Beasley, Chief Justice, sitting for the Chancellor.

Mr. Vanatta, Mr. C. Parker, and Mr. Williamson, for complainants.

Mr. Abbett, Mr. E. T. Green, Mr. J. P. Stockton, and Mr. Gilchrist, Attorney-General, for defendants.



THE CHIEF JUSTICE.

The first prayer of the cross-bill is, that the complainants, the Delaware, Lackawanna and Western Railroad Company, may be protected by this Court in the exercise of their alleged right to connect the broad gauge tracks of their Boonton branch road with the broad gauge tracks of the defendants, the Erie Railway Company, at the west end of the Bergen tunnel.

The principal ground taken on the argument, in opposition to this claim, was, that this branch road had been constructed without any legislative sanction, and consequently had no legal existence. In the opinion* prepared by me with respect to the second controversy which has sprung up between these same parties, I have stated my conclusion to be, that this branch road, so far as the same affects the Erie Company, must be regarded by this court as a legal structure, and with this result as a starting point, it is not perceived how any other end can be reached than that the prayer of the complainants, in this particular, must be granted.

Taking the lawful existence of this Boonton branch road

* Ante p. 284.

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as a datum, there seems to be no reason, which is even plausible, to be urged against this claim to connect such branch with the tunnel road. It is true, that there is fair ground for the Erie Company to insist, as they do insist, and this I regard as the substantial matter in dispute, that the business of this branch cannot pass through the tunnel without the payment of tolls, but this quite lightly touches the question as to the right of way through this tunnel. On the hypothesis that this view of the Erie Company is the correct one, and is founded on a just construction of the contract of November 1st, 1859, it seems obvious that the complainants have the right of way claimed by them. This right under such an interpretation of the agreement, would then arise out of the acts of the legislature, passed in the year 1858, making this tunnel, and the road through it a public highway for the use of all railroads. And it is certainly a matter of surprise that the defendants in this cross bill should have ventured to resist by force the making of this connection, when in their own bill, then on file in the court, they had expressly stated that such connection was about to be made, and without controverting the right to make it, had simply insisted that the trains coming over such branch would not be entitled to a passage through the tunnel without the payment of tolls. But, as I have said upon the premises, which for the present I must assume the right to make this connection is incontestable, for, if the branch is to be considered as within the contract above referred to, then by force of the express terms of such contract the junction of these tracks is authorized; and if on the other hand such contract is inapplicable, still the right to connect is equally evident in view of the statutes just mentioned. The consequence is, the defendants must be enjoined from further resisting the connecting of this branch road through its wide gauge tracks with their own road at or near the tunnel.

The next question presented by these proceedings is one of much importance. It is that which relates to the rela —

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tive rights of these parties to the use of the Bergen tunnel. With respect to this subject the complainants contend that they have acquired their rights from the contract of November 1st, 1859, while the defendants controvert this, and allege that whatever rights the complainants possess, are conferred by the acts of the 4th and 11th of March, 1858. It will be necessary, therefore, to consider briefly both these sources of title. There is, however, a preliminary objection that was started on the argument which must first receive attention. It was insisted that over a matter of this kind this court had no jurisdiction. The bill asks that, if deemed necessary, regulations should be established by this court controlling the use by these companies of this tunnel, and that a receiver should be appointed to oversee the execution of such regulations; and it was the existence of this power which was denied on the side of the defendants. I have examined the cases cited, but have not found that any of them sustain the objection. These authorities go no further than to say, that a receiver will not be appointed to supersede permanently the managers of a railway and to take charge of the entire affairs of the road. The doctrine has not been extended beyond this, and to this extent it is sanctioned by the cases of *Russell v. East Anglican Railway Company*, 3 Mac. & G. 125, and *Fripp v. The Chard Railway Co.*, 11 Hare 254. These decisions rest on the practical difficulty the court would encounter in any endeavor to conduct, through its officers, the business of a great railway. But because such a function is difficult, it does not follow that it is either difficult or improper for the court to control two or more companies in the enjoyment of property, or a franchise which is held in common, or in which there is a right to a common use. I find nothing in these cases just referred to, nor in any other, which forbids the exercise of such a power as this latter one; but, on the contrary, there are authorities of decided weight that have the opposite tendency. Where two railway companies had agreed to use a railway station jointly, no doubt seems to have been

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entertained, in *The Shrewsbury Railway Co. v. The Chester Railway Co.*, 14 L. T. 217-433, that the Court of Chancery had power to prescribe rules for the use of such station, and to appoint a receiver. See, also, the case of *The Midland Railway Co. v. Ambergate Railway Co.*, 10 Hare 359. In the case before me these parties possess a community of interest in this property. They are tenants in common of an easement, and if this court cannot protect the one against the injustice of the other, the party whose rights are invaded is clearly without any adequate remedy; for it is certain that either of these companies, thus situated, can so act with respect to the common easement as to render it worthless to the other, and thus bring upon the latter incalculable mischief. The general cognizance of equity in cases of this kind, where property is enjoyed in common, will not, it is presumed, be disputed by any one, and I can perceive no reason why this power should not exist where two railroads are such tenants in common, as well as in other cases. In truth, as these companies, although technically private corporations, are in some measure public agents, there exists in such cases as the present, an additional reason why a judicial control should be extended as far as possible over their conduct towards each other. I have no doubt as to the jurisdiction of this court over this subject, and shall not scruple, therefore, to exercise it to the fullest extent that the circumstances of the case may now, or at any time hereafter, appear to require.

To return, then, to the question as to the extent of the rights of these respective parties. I have said that the complainants claim a right to the easement in controversy, by force of the contract dated November 1st, 1859. The parties to this contract are the Long Dock Company of the first part, and the Hoboken Land and Improvement Company of the second part, the rights of the former being now in the Erie Company, those of the latter in the Delaware, Lackawanna and Western Railroad Company. A right of way for a railroad with a double track is given by this instrument to the

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Hoboken Land and Improvement Company over certain lands, the property of the Long Dock Company, and also to the use of the Bergen tunnel, but such rights I think are very clearly subordinated to the rights reserved to the Erie Company. Such subordination was, it is true, drawn in question on the argument, but the language of this instrument is entirely clear, at least to this extent. But the extent of the subjection of the right conferred to the right reserved is a question in which I think there is much obscurity, and this is the only question with which I am at present interested, for I shall not attempt in any other respects to construe this contract. Whether this contract authorizes these complainants to transport their passengers and freight over their present roads through this tunnel, without the payment of toll, is an inquiry that I do not propose to enter upon until the final stage of this cause. All that presses for immediate decision is this question as to the right of precedence through the Bergen tunnel, and the extent to which such precedence under existing circumstances is to be enforced. I have already said that in my opinion this contract gives such a precedence to the Erie Company; it but remains to inquire therefore as to the measure of that right. For this purpose we must look to the language of the instrument itself. This deed first grants to the Hoboken Land and Improvement Company, and their assigns, a perpetual right of way over the said land and premises "and through the said tunnel, for a single or double track railroad," not interfering with the track or the road to be laid by the Long Dock Company for the use of the New York and Erie Railroad Company, but including the right to use the said track or any part or parts of the same on said lands or in said tunnel, "not interfering with the use thereof by said New York and Erie Railroad Company." After this follows the clause upon which the present question depends, *viz.* "And the use of any tracks upon the lands on which the said New York and Erie Railroad is located, shall not at any time be such as to interfere with,

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obstruct, or delay the running of any trains of the New York and Erie Railroad, according to such time tables as they shall from time to time adopt." After much consideration, my construction of this clause is, that thereby the New York and Erie Railroad Company had reserved to them the right to prescribe time tables for the running of their own trains, and that such trains so run were not to be interfered with, delayed, or obstructed by the Hoboken Land and Improvement Company, or their assigns. The provision relating to time tables is, in my judgment, a limitation on the right reserved. If the whole of such provision be struck out of the clause, it will then leave the right reserved to the Erie Company without any qualification, and if the provision therefore is to have any effect, it must be to restrict the right reserved. The first branch of the clause declares that the use of the tracks by the Hoboken Land and Improvement Company shall not be such as to interfere with, obstruct, or delay the running of any trains of the New York and Erie Railroad Company; and if the clause had stopped here, the Erie Company would have possessed, what it claims to possess, the right to an unobstructed way for all its trains of every description, whether such trains should have been run according to a time table adopted by them or not. But the clause does not end at this point, but proceeds to say that the "running" of the trains so preferred shall be "according to such time tables" as shall be adopted by this company from time to time. It is much to be regretted that this sentence does not more clearly express the intention of these contracting parties; but looking at it as it stands, and giving effect to all its parts, I have drawn the conclusion above expressed, that it was designed to give a preference not to all the trains of the Erie Company, but to such only as may be run in conformity to time tables from time to time adopted by that company. Under this view, extra or irregular trains would not be entitled to any precedence. But the statutes of 1858 go, I think, beyond this point, and give a greater superiority to the trains of

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is company. The former of these acts declares, in general terms, that "the tunnel and railroad now being constructed under and through the Weehawken or Bergen Hill," "shall be a public highway, and free to the passage of locomotives and trains and all railroad carriages thereon with passengers and property, upon the payment" of certain tolls. The subsequent act further provides, that all locomotives and trains which shall be run over the said road by the force of these statutes, "shall be so regulated as to the time of starting, running, rates of speed, and tonnage, as not to interfere with the use and occupancy of said railroad by the Long Dock Company or the New York and Erie Railroad Company, or their or either of their grantees or assignees." I can see no uncertainty in this language; it clearly requires every railroad company in the exercise of the statutory privilege, not to interfere in anywise with the "use and occupancy" of the two companies designated. The preference in the use of this tunnel and road thus given, unlike that reserved in the contract already expounded, is not diminished by any subsequent limitation or qualification. Where these acts are applicable, I think their effect is to give to the Erie Company the right to require that precedence in the use of the tunnel shall be yielded to all their trains of every description.

This of course does not mean that this company can lawfully make use of this privilege with a view to embarrass or impede the complainants in the use of this tunnel or the road connected with it. Such conduct would be an abuse of the paramount right of the defendants, and upon a proper case being made, would be so regarded and dealt with by this court.

But this is not the case made by the present bill, for there is nothing apparent, at least upon these pleadings, which shows that the defendants are using the rights which belong to them by way of vexation to the complainants.

It is true that they have recently established certain regulations, but I think, under present conditions, I must

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infer that such regulations were fairly required **by** the needs of their own business. But on the supposition that these regulations have, in point of fact, been fairly **made**, the question is before me whether as these parties **are** at present situated, such regulations are to be permitted to stand. They have been made by the defendants **for** the purpose of giving precedence to their trains of all **grades** over the trains of all grades of the complainants; and **if** it were settled that the complainants were using this **tunnel** by virtue of the statutes of 1858, I should have no **d**ifficulty in sustaining this exercise of power. But such **is** not the admitted status of the complainants, for they insist **that** they have the right to use and are using this easement **by** the authority and under the terms of the contract **above** mentioned, and if this be so, the regulations in question **are** in my opinion, to some extent, illegal and **improper**. Whether the complainants are right in this position **that** they have the present use of this easement by right of **this** contract, is the subject lying at the bottom of this case, **and** I do not think that I should at present express any **opinion** with respect to it, if it is practicable to dispose of **the** present motion on other grounds. It seems to me a **question** full of obscurity and difficulty. The structure of **the** instrument which gives rise to it is so confused, and its **language** is so indefinite, that I much doubt whether, with the light which circumstances may eventually throw up **it**, it can be ever interpreted or applied by any judicial **tribunal** with entire satisfaction to itself. I shall therefore wait, before attempting its exposition on the main point **this** controversy, for all the aid to be derived from the **proofs** in the case and the argument of counsel on the **final** hearing. I am enabled, I think, to do this, because the **circumstances** of the case are such as to put it in my power to **control** sufficiently for present purposes, the use of this **tunnel** by these companies. The circumstances upon which **rely** are the following:

In the year 1865 these companies established, by mutu

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agreement, certain general regulations of the use of the Bergen tunnel. I was strongly impressed with the necessity of that act, as well as for vigilance on the part of this court, from the testimony of a witness who is an officer holding an important post in the service of the defendants, and who, referring to that period, says: "At that time trains were being run through the tunnel without being obliged to stop at either end, and I consider that only a special Providence prevented serious accidents, as engineers of both roads would run to get in the tunnel first, and would follow each other too close for safety, as I thought." This state of affairs, which shows great culpability in those who at that time had the management of these companies, was succeeded by the system of rules to which I have just referred, a system which, in an eminent degree, seems adapted to secure the safety of travelers and other persons passing over these roads. By those regulations the Erie trains had the right to enter the tunnel in advance of the trains of the Morris and Essex of the same class. Those regulations appear to have continued in force until some time last June, when the defendants served upon the complainants a notice that they had altered them, to the effect that all time-table trains on the Erie Railway were to have the right to the road through the tunnel in advance of any trains on the road of the complainants, and that no train of the complainants would be allowed to enter the tunnel ahead of any time-table passenger or freight train on the Erie Railway, when, by so going ahead, the Erie train would be delayed. The last clause of this amended regulation contained the following requisition: "An extra or irregular freight train on the Erie Railway, at the tunnel at the same time with any train on the Delaware, Lackawanna and Western Railroad, will have the right to the road in advance of the train on the other road." This alteration of the existing arrangement was objected to, and its enforcement resisted by the complainants. About this same time, the defendants caused a notice to be served on

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the complainants, informing them that they claimed to be the owners of the tunnel, as they denied all right to its use by virtue of the contract.

This demand was likewise rejected, and thereupon the defendants, to settle these two questions, filed the original bill in this cause. In this bill it is stated that the Delaware, Lackawanna and Western Railroad dispute their right to alter those regulations, and they complain that the employees of that company prevented them from being carried into effect. This bill also admits that those regulations cannot be enforced without danger to passengers. And it was to have these matters quieted and settled that the Erie Company came into this court. It also, I think, appears in this case that these points in dispute were to be considered as practically waived on both sides during the pendency of the suit. But the papers before me make it quite manifest that these hostilities have not ceased, even temporarily; this appears from the cross-bill and the answer to it. It is also evident that this state of things is not unattended with danger to the lives of those who travel upon these roads.

From these facts, I feel both authorized and compelled to define, as far as at present practicable, the right of these competing parties, under the peculiar circumstances above detailed. With their bill on the files of this court, seeking an adjudication of these same matters, I do not think the Erie Company should be allowed to enforce those regulations, thus altered, without the consent of the other side except in those particulars with respect to which their power is indisputable. I have already stated my opinion, to be, that in any event the only limitation on the right of the Erie company to precedence in the use of this tunnel is that contained in the contract of 1st of November, 1859. By force of that limitation their right to precedence is restricted to those trains running according to time-tables adopted by them. It may be that by the ultimate decision of this case it will appear that this contract is to be the measure of the

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nts of these parties, and until that stage of this cause
l have been reached, it cannot but be in doubt whether

Erie Company have any priority of way, beyond the
it just mentioned. The right to precedence for the time-
le trains being clear, so far as these new regulations en-
ce that precedence I shall hold them to be legal, and
y must be submitted to accordingly. Beyond this I do

think these regulations ought at present to extend, and
hall therefore enjoin that part of them which gives a
ference to extra or irregular trains. Under existing cir-
nstances, it does not seem to me necessary or advisable
appoint a receiver or manager of this tunnel. The sig-

s and other apparatus provided, and the rules for the
ning of the trains which have been established, are
ply sufficient, if properly applied and enforced, to make
use of this part of the road perfectly secure. With

ir rights thus provisionally settled, I do not anticipate

further strife, even on the part of the subordinate
nts of these parties. It is the obvious and imperative
r of those at the head of affairs to see that no such
e occurs, and it is assumed with confidence that they
, to the utmost of their ability, discharge that duty.

HALL vs. PIDDOCK and others.

A court of equity will not interfere with proceedings for partition com-
ced at law, unless such interference becomes necessary to protect some
y thereto from fraud or wrong, or to secure to him some clear right which
aw tribunal, from the manner of proceeding before it, cannot secure.
such purpose courts of equity will interfere to prevent a failure of jus-
and loss of rights.

A tenant in common, who has made improvements on the land held
ommon, is entitled to an equitable partition. The only good faith
ired in such improvements is that they should be made honestly, for the
ose of improving the property, and not of embarrassing his co-tenants,
cumbering their estate, or hindering partition. The fact that the

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tenant making such improvements knows that an undivided share in the land is held by another, is no bar to equitable partition.

3. It is no bar to allowance for improvements in equalizing the partition, that the improvements were made by tenants in common in reversion during the previous life estate.

4. Reference to a master, with specific instructions, to ascertain and report whether partition cannot be made by payment of owelty; if not, sale will be ordered and improvements allowed for out of proceeds.

5. Costs and expenses of defendants in the proceedings at law for partition, those proceedings being authorized by statute, and arrested by this court in order to more complete equity, will be allowed out of proceeds of sale.

The argument of this cause was had upon the bill, answer, and proofs.

Mr. L. Zabriskie, for complainant.

Mr. G. A. Allen, for defendants.

THE CHANCELLOR.

The object of the bill in this case is to restrain partition proceedings commenced at law, and for an equitable partition in this court. Courts of law have jurisdiction of partition as well as courts of equity, and when proceedings have been commenced at law the tribunal must retain the jurisdiction, and a court of equity will not interfere with it unless such interference becomes necessary to protect some party thereto from fraud or wrong, or to secure to him some clear right which the law tribunal, from the manner of proceeding before it, cannot secure. For such purposes courts of equity in exercising one of their principal functions, which is to remedy injustice occasioned by the strict rules of the law and the manner of proceeding in courts of law, will interfere to prevent a failure of justice and loss of rights.

In this case the complainant is tenant in common with the defendants, of an acre of land partly covered with buildings, situate in the county of Hunterdon, of which

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s three-fourths, and the defendants one-fourth. He claims that the buildings on the land were erected by those under whom he derives his title to the three-fourths, and that no part were erected by the defendants, or those under whom they obtained title.

The land belonged to Abraham Van Horn, who died in 1833. He devised it to his wife for life, and then to trustees for his son Matthew for his life, and at the death of Matthew to his four sons. The widow, Matthew, and three of his sons, conveyed the land to Abraham L. Voorhis, conveying that the fourth son, George, should convey when of age.

Abraham L. Voorhis conveyed to D. Sanderson, who supposed that the title was perfect, and erected some buildings; Sanderson conveyed to John Hall, who supposed the title good, erected other buildings at considerable expense, and kept a hotel in the mansion-house built by him on the premises. There were no improvements on the premises when conveyed to Abraham L. Voorhis. In 1865 Matthew died, and on the 1st of April of that year his son George conveyed his fourth to the defendants. Hall, believing his title good, denied their right, which they established by obtaining an ejectment. The defendants then applied to the Chief Justice for the appointment of commissioners to divide, under the statute for the more easy partition of lands; and such proceedings were had on that application, that an order for sale was made before the complainant had any knowledge of the proceedings. The regularity and legality of these proceedings are not denied.

These facts stated in the bill are all admitted by the answer, except the allegation of the complainant, that he and those under whom he claims supposed that they had good title to the whole of the premises. Upon this point much evidence has been taken. But as this question, in the view of the matter, is not material to the decision, I shall not review this evidence.

The rule that a tenant in common, who has made improvements on the land held in common, is entitled to an

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equitable partition, is well established and is hardly disputed by counsel. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants, or encumbering their estate, or hindering partition. And the fact that the tenant making such improvements knows that an undivided share in the land is held by another, is no bar to equitable partition. No other want of good faith is alleged or contended for by the defendants in this cause.

The peculiarities of an equitable partition are, that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others; that when the lands are in several parcels each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; that where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for owelty or equality of partition, by one whose share is too large to others whose shares are too small; and that where one joint owner has put improvements on the property, he shall receive compensation for his improvements, either by having the part upon which the improvements are assigned to him at the value of the land without the improvements, or by compensation directed to be made for them.

The doctrine as to allowance for improvements is laid down by Justice Story in 1 *Eq. Jur.*, § 655. It was recognized and acted on by the English Court of Exchequer in equity, in *Swan v. Swan*, 8 *Price* 518. By the courts of New York, in *Town v. Needham*, 3 *Paige* 553; *St. Felix v. Rankin*, 3 *Edw. Ch.* 323; *Conklin v. Conklin*, 3 *Sandf. Ch.* 65, and *Green v. Putnam*, 1 *Barb. S. C.* 500. And by this court, in *Brookfield v. Williams*, 1 *Green's Ch.* 341; *Obert v. Obert*, 1 *Halst. Ch.* 397, and *Doughaday v. Crowell*, 3 *Stockt.* 201.

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In *Green v. Putnam* and *Brookfield v. Williams*, as in this case, the improvements were made by tenants in common in reversion during the previous life estate, which was no bar to the allowance. And in *St. Felix v. Rankin*, *Conklin v. Conklin*, *Doughaday v. Crowell*, *Town v. Needham*, and *Brookfield v. Williams*, the complainants were the parties claiming the allowance. And the allowance in these cases was not made on the principle that a party asking relief in equity must first do what is equitable himself.

In making the partition in this case, if any can be made without great injury, the share or one-fourth to be allotted the defendants, must, if practicable, be set off from such part of the premises as has no improvements upon it or improvements of small value, and must be equal in value, without improvements, to one-fourth of what would be the value of the whole tract if it had no improvements upon it.

I am not satisfied from the evidence that this tract can be partitioned in this manner without great injury. The report of the commissioners appointed by the Chief Justice, and his action in confirming it, do not affect the question as *res adjudicata*. There the direction was to divide the whole premises, including the buildings, into four equal shares, and to assign one share by lot to each of the original tenants in common. I am satisfied that the premises could not be divided in that manner without great prejudice to the owners.

In examining the map annexed to the answer, I see that the northeast side fronts on a public road, and that on the southwest side of the tract a lot of ninety feet in front, with a depth which might be extended to two hundred and twenty-five feet, being nearly one-half of the whole tract, has on it only a granary and a shed. If these are of small value, their value might be disregarded by consent of the complainant; or if they are, as seems probable, buildings that can be removed without much loss, the right to remove them within a reasonable time might be reserved to the complainant. Coupled with the right in equity to allow

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a proper amount as owelty to equalize the partition, the evidence, which consists mainly of the opinions of witnesses without regard to these matters, does not convince me that a partition cannot be made without great injury.

It must, therefore, be referred to a master, to inquire into and report what would be the value of the whole tract if no improvements had been made upon it, and whether some part of the tract upon which no improvements have been made, or only improvements of small value, or that can be removed without material loss, cannot be set off, which will be, without improvements, equal in value to one-fourth of the value of the whole tract so ascertained; or whether such part cannot be set off in that manner by allowing or charging a reasonable sum for owelty. And whether such partition can be made without great prejudice to the owners of the property. And further to inquire into and report what is the present value of the premises with the improvements now standing on them, and also what has been the yearly net value of the premises from April 1st, 1865, when the defendants acquired their title to the one-fourth of it.

The defendants are entitled to such portion of the fourth of the net proceeds of the premises as belongs to the land. The proper way to ascertain and apportion that, is to give to the land such proportion of the whole net yearly value as the value of the land bears to the value of the whole premises, and to award one-fourth of it to the defendants.

If it shall appear that the premises cannot be divided in the manner directed, a sale must be ordered, and out of the proceeds of the sale a proper allowance made for the value of the improvements put upon the premises. The part of the proceeds to be allowed for the improvements must be such proportion as the value of the improvements, that is, the excess of the value of the whole over the value of the land, bears to the value of the whole premises. The cases of *Conklin v. Conklin* and *Green v. Putnam*, are authority for such allowance out of the proceeds of the sale. In the last case, Justice Paige says: "Where one tenant in com-

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lays out money in improvements on the estate, a court of equity will not grant a partition without first directing account and suitable compensation, or else in the partition it will assign to such tenant in common that part of premises on which the improvements have been made." The court directs a reference to inquire into the value of the things, and by whom paid for, and the amount of rents and profits, and by whom received, so that in case a sale should be ordered the proper allowance might be made. The costs and expenses incurred by the defendants in the proceedings for partition begun by them, must be allowed out of the proceeds of sale; those proceedings were authorized by statute, and were arrested by this court in order that more full equity might be done between the parties than could be done at law.

 LAWRENCE vs. LAWRENCE.

An answer, though responsive, has not the effect of evidence, where facts are not within the personal knowledge of the defendant. It throws the burden of proof on the complainant, but has no further weight.

The question being merely whether the complainant was half owner of certain lands, and entitled to a conveyance of an undivided half thereof, facts of the case held to substantiate complainant's claim.

A suit in the nature of a suit for specific performance, requires diligence in performance and in bringing suit. A suit for the declaration of a trust does not require the same diligence.

Where two purchase lands, and one takes the title in his own name, and the co-purchaser has paid his whole share of the consideration and has been permitted to possess and enjoy the property, delay in bringing suit for relief will not bar relief.

The bill was to compel a conveyance of the undivided half of a certain number of parcels of land in Monmouth and Ocean counties, by the legatees and executors of James S. Lawrence, deceased. The grounds of the claim were that the lands were purchased by or conveyed to James S. Lawrence, for the

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joint benefit of himself and the complainant, and that the complainant advanced the whole or half of the money for the purchase, and that James S. Lawrence always, in his lifetime, acknowledged and treated the complainant as joint owner with him. The answer denies that the lands were purchased by the complainant, or that the money for the purchase was paid by him in whole or in part; but it admits that at or shortly after the time of the purchase, there was an agreement between the complainant and James S. Lawrence, that if the complainant would pay to him one-half the whole purchase money, which was \$175, he would convey to him one-half the lands, but it denied that he had ever paid to James S. Lawrence one-half of the purchase money. Upon this issue a large amount of depositions and documentary evidence was taken and produced on both sides.

The cause was heard upon the pleadings and proofs.

Mr. W. H. Vredenburg and *Mr. J. Parker*, for complainant.

Mr. J. F. Randolph, for defendants.

THE CHANCELLOR.

The answer admits and states, that the complainant requested James S. Lawrence to purchase these lands, and to allow him, when he should pay one-half of the purchase money, to become owner of one-half in partnership with him, and that upon such suggestion and request, James S. Lawrence agreed with the complainant to purchase the lands, and that the complainant, when he paid one-half the purchase money, should become partner with him in the ownership of the lands. But the answer denies that the complainant ever paid the half of the purchase money.

Upon this question of the payment of the purchase money the whole controversy rests. [The denial in the answer has not the effect of evidence because, although responsive

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the bill, none of the facts are within the personal knowledge of any of the defendants. It, as pleading, throws the burden of proof upon the complainant, but can have no other weight.] Facts sufficient to constitute part performance of such contract are abundantly shown; for years both parties treated these lands as their common property, jointly sold and cut the wood growing on them, and both went out, together and when apart, that it was their joint property.

Conditions of the auction sale of timber, December 18th, 1848, more than two years after the purchase of the lands, drawn by James S. Lawrence, and signed by him and the complainant, state the sale to be of timber standing on lands *belonging to* the subscribers. This was, as is proved and conceded, timber on the lands in question. A large number of respectable witnesses, whose credibility is not impeached, testify that for years James S. Lawrence treated these lands and spoke of them as belonging to both. Taxes on them were assessed to both, and paid sometimes by one and sometimes by the other. These facts are circumstantial proof, difficult to overcome, that the money had been paid. The memorandum book or diary of James S. Lawrence, is in evidence. In this, on December 18th, 1848, he enters: "Went to sale of timber standing at Obhonnon swamp, sold by J. N. Lawrence and myself; amount of sales \$257.56. My three shillings and ninety-hundredths, sold with the partnership number." This is strong evidence that the partnership was consummated and the money paid, or considered as paid by James S. Lawrence. The property was conveyed to him by Helena Lawrence Pennington and her trustees, by deed dated May 19th, 1846. By the ledger of James S. Lawrence, produced and offered in evidence, it appears that on June 19th, 1846, he charged the complainant in these words: "To one-half of the price paid Mrs. Helena Pennington, for her interest in the lands in New Jersey, \$87.50." He then charges him with interest on that sum to April 19th, 1848, the date of the account then stated in his ledger. The whole

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amount of the debts against the complainant in that account is \$303.01, and the amount of credits is \$411.17; showing that, by the account as it then stood, there was a balance due from him to the complainant, and that the amount of \$87.56 was thus, at that date, paid to him. This was eight months before the auction sale of December 18th, 1848, which he stated in the written conditions that these lands belonged to both. In this ledger there is at the foot of the account, in the handwriting of James S. Lawrence, the entry: "The above account included in subsequent settlement. James S. Lawrence."

This settlement appears in Exhibit 2, offered by the defendants; this settlement was made to April 1st, 1855, and shows a balance of \$1232.71 due to James S. Lawrence, for which a mortgage, dated May 28th, 1855, appears to have been given, and this mortgage is shown to have been satisfied. Now, in the items of this account, the charge of \$87.50, and the interest upon it, does not appear. All the other items in the account of April 19th, 1848, as stated in the ledger, are included in it. From this an inference might arise that this sum was not, after all, paid by the complainant. But the certificate of James S. Lawrence in the ledger, that these items were included in subsequent settlement, is too strong to be overcome by the negative evidence, supported as the entry is by the conduct and declaration of the parties for years. That debt may, between 1848 and 1855, have been satisfied and paid off by some other dealing not entered into the account in Exhibit 2. The presumption is that after the sales of timber between 1848 and 1855, in the proceeds of which the complainant was allowed to participate to the amount of one-half, the payment which had once been made by the credits in the ledger, would not have been taken back; and if it was taken back, either purposely or by inadvertence, the right to the conveyance having once vested in the complainant by the payment of the money, would not be taken away by the repayment alone, unless made with the declared purpose of rescinding the contract.

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There is no evidence of such intention, and it cannot be presumed without proof. I feel compelled to conclude from these entries, and the conduct and declaration of the parties, that the money was paid to James S. Lawrence, and that the complainant is entitled to a conveyance of one-half of the lands included in the deed from Helena Lawrence Pennington and her trustees, to James S. Lawrence.

The lapse of time between the agreement and payment, and the bringing this suit, (being from 1846 to 1863,) and in any cases a tithe of the time, would be sufficient to bar the relief, but for the attending circumstances. This suit is in the nature of a suit for specific performance, which requires diligence on the part of complainant both in performance and in bringing his suit. If it was for the declaration of a resulting trust, such diligence is not required.

But in this case the performance on the part of the complainant was in 1848, when the whole amount was paid by him in the manner above stated and accepted by James S. Lawrence; and the complainant was admitted, during the life of James S. Lawrence, to the full enjoyment and possession of his half of the lands. When the purchaser has paid the whole consideration, and has been permitted to possess and enjoy the property purchased, delay in bringing suit will not bar relief. This was the case in *The New Barbours Toll Bridge Co. v. Vreeland*, 3 *Green's Ch.* 157, in which relief was not refused after a lapse of twenty-three years, though it was decreed without costs. There the complainants had taken possession of the lands occupied by their turnpike road, which ran across the defendant's farm and by his door, and he had acquiesced in their constructing the road, and used it with the rest of the public during this time. The only object was to obtain the legal title, and the complainants had immediately performed their part of the contract, which was to construct a public turnpike upon the land. In this case the delay cannot bar the relief, as the consideration was paid in full and accepted by James S. Lawrence, and the complainant admitted to full enjoyment of the estate.

 Clark v. Condit.

CLARK vs. CONDIT.

When the evidence taken before a master is evenly balanced, his conclusions thereon will not be set aside unless clearly wrong.

The argument was upon exceptions taken by both parties to the report of the master. This report was made upon a reference directed pursuant to the opinion of the Chancellor on the hearing of the cause, reported in 3 *C. E. Green* 358.

Mr. T. Runyon, for complainant.

Mr. J. W. Taylor, for defendant.

THE CHANCELLOR.

It was referred to the master to ascertain and report whether the sales of parts of the mortgaged premises made by the defendant, were below the fair value of the property at the time of the sales, and to take an account of the rents received by the defendant, and to state the amount due from the complainant to the defendant.

The master has reported that the sales were made at the fair market value of the property at the time of the sales and that the defendant ought to be charged with \$14,966.50 as the fair rental value of the property, being \$5,068.40 above the amount accounted for as received by him, and that he ought to be charged with \$1,053.87 interest thereon.

The complainant has filed exceptions to this report, first because the master ought to have charged a large sum for the excess of the value of the parcels sold, above the price received.

There is the testimony of a number of respectable unimpeached witnesses on both sides; it is a simple question of the weight of evidence. If the master put more confidence in the testimony of the defendant's witnesses than he did in those of the complainant, his conclusion is right. He could

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much better judge of the weight to be given to the testimony of each witness than I can. There is clear testimony of respectable witnesses to sustain his conclusions, and had he arrived at a different conclusion, there is as good evidence to have sustained that. In such cases the established rule is, that the court will not set aside the conclusion of the master upon the evidence, unless clearly wrong. 2 *Daniell's Ch. Pr.* 1246; *Izard v. Bodine*, 1 *Stockt.* 309; *Sinnickson v. Bruere*, *Ibid.* 659; *Adams v. Brown*, 7 *Cush.* 220.

It is not clear to me that the master has erred as to the weight of the testimony on this point. This exception must be overruled.

The complainant's second and third exceptions are, that the master has not charged the defendant with the amount that he ought to have received for rents. The master had evidence on both sides, as to the rents which ought to have been received for this property. The witnesses differ among themselves greatly.

The master has from this evidence arrived at a conclusion as to the fair rental value of the property while in Condit's hands; a conclusion to which both parties except. It is about a medium between the testimony of the extreme witnesses. The defendant testifies as to what he actually received, and that he rented it to as good advantage as he could at the time. The real estate agents who made estimates for the complainant, testify to their estimates, and that they think that the rents estimated by them could have been had for the property. Such estimates are matters of opinion, and are apt to lean to the side of the party called for them, and although honestly expressed, are always tinged with views peculiar to the witness. If he has been at the time in question a hopeful and buoyant operator in real estate, his opinion would differ much from what it would have been if he had taken the opposite view; and that even as to values in the past, when he does not state them from actual sales or lettings. At the best, all such evidence, at least in the shape in which it was put before the master, is mere matter of opinion.

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At all events it does not appear to me that he has erred in this matter with sufficient clearness to set aside his report and sustain the exception.

For the same reason the first exception of the defendant, that the rents are overcharged to him, must be overruled.

The second exception of the defendant is abandoned, and his third and fourth exceptions are not sustained by the evidence.

The exceptions of both parties must be overruled, with costs to be paid by each to the other.

 BEATTY'S ADMINISTRATOR v. MONTGOMERY'S EXECUTRIX.

MONTGOMERY'S EXECUTRIX v. BEATTY'S ADMINISTRATOR.

1. Whether a legacy is vested or contingent, depends upon the event, and not upon the time. If the event is uncertain, the legacy is contingent though the time is fixed: if certain, the legacy is vested though the time is uncertain.

2. A legacy to A for life, and upon A's death to B, C, and D, is a vested legacy, and if B, C, and D die in the lifetime of A, their legal representatives are entitled, upon A's death, to their respective portions. A provision in the will that in case of the death of either of the legatees in the lifetime of A his share should go to the survivors or survivor, does not prevent the vesting.

3. If a legacy is given simply to A without fixing any time for payment with provision that if A shall die it shall go to B, this gives a vested legacy to A if he survives the testator: the death is held to be death in the lifetime of the testator.

4. But if a legacy given to one at the death of a person named is given to another in case such legatee should die, this is held to refer to death in the life of the person at whose death it is given. Such legacy vests at the death of the testator.

John Castner, the complainant in the original bill filed him as administrator of James M. Beatty, William Beatty and Wesley Beatty, respectively, seeks to recover legacies

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on to the decedents, of whose respective estates he is administrator, by the will of James Montgomery, deceased. The defendant, Maria Alling, is the executrix of the will of John Alling, the last surviving executor of the will of Montgomery. Maria Alling, as such executrix, filed the petition, praying the directions of the court as to the payment of these legacies, and for a construction of the will of Montgomery.

The will of Montgomery was made in April, 1833. In the second clause he provided for his wife in these words: "I give and bequeath unto my said wife the interest of \$100, to be paid to her during her life in half yearly payments." And the eighth clause is: "From and after the death of my wife, I give and bequeath the principal sum of \$100, (the interest whereof I have herein directed to be paid to my wife during her life), to my sister Eliza Beatty's children, as follows: to James M. Beatty, the sum of \$3000, to William Beatty and Wesley Beatty, each the sum of \$100; and in case of the death of one or more of the said legatees, James, William, and Wesley, I give and bequeath an equal share of such deceased legatee to the survivors or survivor of said legatees."

The testator died in 1833, William in 1847, James in 1857, Wesley in 1859, and the widow of testator in 1869. Maria Alling being the residuary legatee, her administrator was made defendant in these suits.

Mr. Knapp, for complainant.

Mr. T. N. McCarter, for defendant.

THE CHANCELLOR.

It is contended by the executrix and the administrator of the estate of the widow, that the legacies to the three nephews did not vest at the death of the testator, but were contingent on their surviving the widow, and therefore, that by the death of all three in the life of the

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widow, before they were to be paid, they lapsed into the residue of the estate.

The event upon which they were given, the death of the widow, was certain and not contingent; the time only was uncertain. It is different from a legacy given at *twenty-one*, or marriage, or *when* the legatee arrives at twenty-one, or marries; these events may never happen, and therefore the legacy is contingent. That the time is indefinite, as where the event is death or marriage, makes no difference; nor does the fact that the time of arriving at twenty-one is certain. If the event is uncertain the legacy is contingent, though the time is fixed; and if certain, it is vested, although the time is uncertain.

But on this point there is a diversity of opinion among the authorities, or rather in the dicta of the judges. One case, and only one, so far as I can discover, holding that a legacy given at a future time, fixed and certain, is contingent, and lapses by the death of the legatee before that time. This is the case of *Smell v. Dee*, 2 *Salk.* 415, decided by Lord Chancellor Cowper. And although the decision is not sustained by the authorities cited to support it, which are all cases where the event is uncertain, yet the case has been cited with approval by judges of high authority where the case under consideration did not involve the question, and their attention was not called to the distinction between a certain and contingent event.

But for this case it is not necessary to reconcile these discordant views. Here the interest of the sum in question is given to one person for life, and at her death to these legatees. And in such case it is well settled by numerous decisions, from *Stapleton v. Cheele*, 2 *Vern.* 673, decided in 1711, to the present time, that the legacy vests on the death of the testator. There is no diversity in the decisions on this point. In this state the law is settled by the case of *Green's Adm'r v. Howell's Ex'r*, in the Supreme Court, and Court of Errors, 1 *Vroom* 326, and 2 *Vroom* 570. In that case the doctrine received the unanimous approval of the

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the Court and the Court of Errors. And in the in the latter court the Chief Justice says: "In the tion of the principle it is not material whether the the legatee for life is of the fund, or the interest or he fund." In the case of *Thomas' Ex'rs v. Anderdm'r*, ante p. 22, the same doctrine was held and . It must, therefore, be considered as the settled this court. None of the cases require that the fund be separated from the rest of the estate and invested lf.

do the provisions of the eighth clause of the will, case of the death of either of the legatees his share go to the survivors or survivor, prevent the vesting. legacy is given simply to A without fixing any time ment, with provision that if A shall die it shall go his gives a vested legacy to A if he survives the tes- the death is held to be death in the life of the testa- But if a legacy given to one at the death of a person , is given to another in case such legatee should die, held to refer to death in the life of the person at death it is given. Such legacy is held to vest at the of the testator, subject to be divested on the happen- the event, that is, dying in the life of the person . *Hervey v. McLaughlin*, 1 Price 264; *Clarke v. , 7 Sim.* 197; *Whitton v. Field*, 9 Beav. 368; *Ed- v. Edwards*, 15 Ibid. 357; *Salisbury v. Petty*, 3 36; *Green v. Barrow*, 10 Hare 459; *Williamson v. berlain*, 2 Stockt. 375; 2 Williams on Execu- 34.

se legacies were then vested in James, William, and y, with a limitation over to the survivor, in case of ath of either in the life of the testator's widow. Now limitation to the survivor is to the survivor at the of the widow, the time when the legacies were given, ere was no survivor at that time, the limitation over took effect, and the legacies being vested, they each to the representatives of the proper legatee at the

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death of the widow. This was so ruled in *Harrison v. Foreman*, 5 Ves. 207; and in *Gray v. Garman*, 2 Hare 268. And in *Salisbury v. Petty*, 3 Hare 85, it is held that where legacies were given to two at the death of the legatee for life, with a provision that if either should die leaving issue, his share to such issue, that the legacies vested at the death of the testator, and the share of one who died in the lifetime without issue, did not lapse or divert by his death, as the event on which it was limited over had not occurred, but that it went to the representative of the legatee.

These decisions seem to me to be supported by principle. Accepting them as the rule, I must hold that these legacies vested in the several legatees at the death of the testator, and that as neither survived the widow, there was no one who could take by the limitation over, and therefore, that the administrator of each is entitled to the legacy to his intestate, with interest from the death of the widow.

 KLOEPPING and wife vs. STELLMACHER.

Mere inadequacy of price is not sufficient to set aside a sheriff's deed, nor is it, *per se*, proof of fraud. But even if there has been no fraud, if the inadequacy is gross, and the party whose property has been sold, by reason of mistake or misapprehension did not attend the sale, and the sacrifice was caused by such mistake or misapprehension, the sale will be set aside—

This cause was submitted upon briefs, upon bill, answer and proofs.

Mr. Bretzfeld, for complainants.

Mr. F. B. Ogden, for defendant.

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CELLOR.

Complainants ask to have a deed made by the sheriff on behalf of the defendant, for a house and lot of Mrs. [redacted] set aside. The grounds alleged for the relief are, first, that the property on which the sale was had was fraudulently sold, and for a much larger amount than was paid by the complainants, or either of them, were not present in the suit, and did not know of its existence until the execution issued upon it; and that the property was worth over \$2000, and was sold for \$52 only. It only appears that the property sold was worth \$1000 and was sold for \$52. This is a gross, a very great inadequacy of price, from which fraud in some cases may be inferred without further proof. Inadequacy of price is not sufficient ground to set aside a conveyance, but, together with, or, in the absence of, proof of fraud. *Bank of New Brunswick v. [redacted]*, 1 Saxt. 1; *Crane v. Conklin*, Saxt. 346; *Smith v. [redacted]*, 1 E. Green 240; *Marlatt v. Warwick*, 3 C. E.

When such gross inadequacy is combined with fraud or any other ground of relief, in equity it will be the duty of the court strongly to afford such relief. The sale in this case is a great oppression on the complainants. They are ignorant, stupid, perverse, and poor. They lose by it all they have, and are ill-fitted to acquire more. They are poor, and the court should incline to protect, notwithstanding the evidence.

The court does not sustain the allegation that they were not served with process in the suit in which the judgment was rendered. That was done by Justice Aldridge. The record shows that the writ was duly served on both, and the constable who testifies that he did so by handing each a copy of the writ. The testimony of the complainants does not, however, overcome this proof.

The judgment was founded on a transcript of another judgment obtained before Justice White, for about \$44, on

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which the complainants had paid that justice \$36, as appears by their testimony and the receipt of Justice White. This was paid under an understanding that they should be permitted to pay it by instalments of six dollars each, and the complainants seemed to think it was impossible, after one judgment for this debt, and so large a part of it being paid and an arrangement made with the justice himself about the payment of the residue, that another suit could be brought. The constable testifies that Kloepping took a copy from his wife, tore up both copies, and said that they did not want any summons.

The judgment was docketed, and an execution issued to the sheriff; the sale was properly advertised and was adjourned by the sheriff several times. The property was fairly put up and struck off. The defendant was present; he did not bid, but after the sale the purchaser transferred the bid to him. No positive fraud by him is shown; on the contrary the whole circumstances seem to clear him of charge of fraud, other than the inference from inadequacy of price.

The conduct of the sheriff was free from all blame; he adjourned the sale to allow the complainants to get notice, attend, and protect themselves. He requested one of his deputies, and a respectable attorney who was present, to give the complainants notice of the intended sale; each of these persons testify that he gave them such notice. There is nothing on which to found any charge of fraud upon any one concerned in the sale.

But a court of equity will set aside a sheriff's sale, even if there has been no fraud, when there is a gross inadequacy of price, and the parties, by reason of mistake or misapprehension, did not attend the sale, and the sacrifice was caused by such mistake or misapprehension. *Seaman v. Riggin*, 1 *Green's Ch.* 214; *Howell v. Hester*, 3 *Green's Ch.* 266.

In this case the sacrifice is so great, and its consequences to persons in the condition of the complainants so important, that I cannot believe that they comprehended and

Reid v. Reid.

ieved the fact, that this property was to be sold by the sheriff for this debt, at the time when it was sold. They were both foreigners, spoke and understood the English language badly, and their own language was more or less imperfectly spoken by those who gave them information. I must believe that Mr. Wright and Mr. Lyon gave them the information as they testify. But I cannot believe that the complainants understood and believed it. They evidently thought it impossible that courts of justice would sell a house and lot worth \$1500 for a debt which had been paid within \$8, and the payment for the balance arranged with the court. Persons less ignorant and stupid might have arrived at that conclusion. And although the information was given and understood, yet if from the evidence and circumstances it appears that they did not believe it, they were under a mistake, perhaps caused by their own stupidity and perverseness, yet it should not be punished by a loss so great to them as this sale, if allowed to stand, would cause.

The deed must be declared void, and the defendant directed to re-convey the property, but as he has been guilty of no fraud or wrong, it must be upon payment of the price paid by him for the purchase, with interest from the payment, and of his costs in this suit.

REID vs. REID.

1. Refusal by a wife of marital intercourse with her husband does not justify him in deserting her.

2. When in a suit for divorce adultery is pleaded in recrimination, the facts of adultery must be designated and specified in the same manner required in a bill or petition for divorce for adultery.

3. A charge of adultery pleaded in recrimination as a bar to divorce, must be sustained by other proof than the unsupported evidence of the defendant pleading it.

Reid v. Reid.

This cause was argued on final hearing, upon bill, answer, and proofs.

Mr. J. Parker, for complainant.

Mr. Leupp, for defendant.

THE CHANCELLOR.

The suit is for a divorce on the ground of desertion. The bill was filed in November, 1865, and charges desertion from March 1st, 1862, until the commencement of the suit. The facts admitted by the defendant in his answer, and his testimony, when sworn as a witness, are such as amount to a desertion of his wife. They lived together on a farm. He left his house on or before the first of January, 1862, with the intention of never going back to it while she was there. He advertised his farm, and all his goods and furniture for sale, and sold them at auction in February. The farm he sold and conveyed to his brother, who brought suit in ejectment against the complainant for it, and she in consequence left it in June; nearly all the furniture and provisions had been sold at the sale and removed after it, and the defendant afterwards furnished her no means of support. On December 10th, 1861, he had inserted in one of the county newspapers, a notice signed by him, warning any one from trusting her on his account. He never offered to take her back, or to provide her a home or support. This is clearly desertion, and unless justified by her conduct, is that kind of desertion which entitles her to a decree for divorce.

The defendant in his answer sets up two charges in re- crimination: first, that for a year before his desertion she refused marital intercourse with him; and secondly, that the complainant, both before and since the desertion, has committed adultery with persons whose names are not mentioned.

The refusal of marital intercourse without sufficient reason is a wrong, and cannot be justified. But it is not sufficient

 Reid v. Reid.

to justify either adultery or desertion, or any other unlawful marital dereliction on part of the party deprived of these rights. No authority is produced, and I know of none to sustain such position.

But adultery pleaded in recrimination, if properly pleaded and proved, is a good bar to a divorce. In this case the adultery is not properly pleaded. The defendant cannot plead generally that the complainant has been guilty of adultery, without naming the person with whom committed, or in some way describing him, or by giving time, place or circumstances, and thus identifying the act in such manner that the charge intended can be identified and repelled. For this purpose the same particularity is required as in a bill for divorce on account of adultery. A plea of new matter in bar, either at law or in equity, must be specific. *Jones v. Jones*, 3 C. E. Green 33; *Marsh v. Marsh*, 1 C. E. Green 391; *Mills v. Mills*, 3 C. E. Green 444; *Miller v. Miller*, 5 C. E. Green 216.

But without regard to the defect in pleading, none of the facts of adultery relied on are sufficiently proven.

The first charged in point of time, is with James Mount. This is testified to by W. C. Lewis. His story is rather improbable, and is denied by Mrs. Reid and Mount in their testimony. If it was proved, it had been condoned long before the desertion. The defendant cohabited with his wife for more than two years after Lewis told him of the fact; he admits that Lewis told him of it. This, as Lewis testifies, was two or three days after it occurred.

There is no evidence of adultery with Samuel Ely, the second charge attempted to be proved. The only fact tending to it is, that the defendant looking through the window, once saw Ely put his arm around her neck and kiss her, when in the house. She and Ely both deny it. It is a settled principle that a divorce is never granted upon the unsupported evidence of a party; and the like rule must apply to a charge pleaded in bar.

There is no evidence from which adultery with John

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Ricketts can be inferred. He was seen sitting with complainant by an open window, and had left the room when the witness got up stairs to it.

The act charged with Wyckoff Morris, depends upon the testimony of Jane Preston. The facts proved by her are sufficient to create suspicion, but hardly sufficient to sustain the charge of adultery. But these facts are explicitly denied by the complainant and Morris, in their testimony, and she is contradicted by Schenck Bennett, in a material fact brought in to support her testimony.

The last charge of adultery in the evidence, is at her house where she lived, at Freehold, in July, 1862. This is attempted to be sustained by the evidence of Sarah Miller. It might be inferred from the facts which her evidence is adduced to support. But the whole force of her testimony depends upon the correctness of her inference that the footsteps she heard going up stairs, and in the complainant's bed-room, were the steps of more than one person; in this she might easily be mistaken. Besides, this testimony is fully repelled by the oaths of the two young men implicated by her; they both deny that they were in the complainant's bed-room on the occasion referred to, and that they ever committed adultery with her. She also denies it upon oath. None of the charges of adultery are sustained so as to bar the complainant from relief.

 BRINKERHOFF vs. FRANKLIN and others.

1. An enrollment will be vacated and a decree opened when the decree has been made unjustly against a right or interest that has not been heard or protected, when this has been done without the laches or fault of the party who applies.

2. A defendant mortgagee is not bound to put in any defence to the answer of a co-defendant, alleging that his mortgage was without consid-

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tion, and fraudulent and void. Such answer could not be taken as confessed against him.

3. A defendant cannot impeach the mortgage of a co-defendant by an answer. A cross-bill is necessary for that purpose.

This was an application to vacate the enrollment of a final decree in a foreclosure suit, for the purpose of opening the decree to permit the petitioner, Catharine A. Franklin, to be made a defendant and to file an answer.

Mr. B. Chetwood, in support of the motion.

Mr. A. Zabriskie, contra.

THE CHANCELLOR.

The petitioner, Mrs. Franklin, holds a mortgage given by the defendant, Wilson E. Franklin and Melissa his wife, to the defendant, Edward Mars; this mortgage was assigned to her by Mars, pending the suit. The mortgage to the complainant is admitted to be the first, and it is so stated in the bill. The mortgage to Mars is stated in the bill to be the second encumbrance.

Charles W. Whitney, and James McNabe, and Todd and Rafferty, and Charles Kenyon, were made parties, because they severally had obtained judgments against Wilson E. Franklin, the mortgagor and owner of the fee. But these judgments, as stated in the bill, were obtained and entered after the recording of the mortgage to Mars, and were subject to it. Whitney, and Todd and Rafferty, answered, setting up their judgments. The defendant, Mars, did not answer, though duly served with process. The bill was ordered to be taken as confessed against him, and in the same interlocutory decree, entered by consent of Whitney, and of Todd and Rafferty, it was declared that the judgment of Todd and Rafferty was the first lien after the complainant's mortgage, and that the judgment of Whitney was the second lien after that mortgage, thus giving them

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the preference over the mortgage of Mars; no proof was taken on which this declaration was founded; there was no consideration of or determination upon the claim of Mars, who was postponed by a decree entered by the consent of the parties interested in postponing his mortgage.

Two questions were argued and submitted.

The first is, whether the court will in any case vacate an enrollment and open a decree regularly made, in order to let in a defence.

The second question is, whether the petitioner has such equitable claim not barred by her own laches, or that of her assignor, as will entitle her to have this decree opened.

It has long been settled that an enrollment will be vacated and a decree opened when the decree has been made unjustly against a right or interest that has not been heard or protected, when this has been done without the laches or fault of the party who applies. *Robson v. Cranwell*, 1 Dick. 61; *Kemp v. Squire*, 1 Ves., sen., 205; *Wright v. Wright*, *Ibid.* 326; *Hargrave v. Hargrave*, 3 Mac. & G. 348; *Wooster v. Woodhull*, 1 J. C. R. 539; *Beckman v. Peck*, 3 J. C. R. 415; *Millsbaugh v. McBride*, 7 Paige 509; *Tripp v. Vincent*, 8 Paige 180; *Robertson v. Miller*, 2 Green's Ch. 452; *Collins v. Taylor's Ex'rs*, 3 Green's Ch. 163; *Miller v. Hild*, 3 Stockt. 25; *Carpenter v. Muchmore*, 2 McCarter 123.

In this case neither Mars nor the petitioner have been guilty of any laches which should estop them from this application. The complainant's bill properly set forth the encumbrances in the order in which they are on their face entitled to priority. Mars had his option to answer the bill, or if there was nothing in it which he wished to contest, to avoid the cost and expense of answer to himself and the estate, by allowing the bill stating facts truly to be taken as confessed against him. This is the effect given to his omission to answer by the statute. *Nix. Dig.* 108, § 21. The only right to make a decree against a defendant who does not appear, is derived from this statute. Before

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the party could be compelled to appear and until he did appear no decree could be made that his right. In England, by divers statutes and incery, the court in certain cases could order an o be entered for him; but when this could not defendant was brought into court more than *habeas corpus*, before a decree *pro confesso* ered.

e of this state authorizes the bill to be taken as nd directs that such decree shall be made he Chancellor shall think equitable and just. n, by this statute, be made upon a bill taken as cept such as shall be equitable and just upon ted in it. On this bill taken as confessed, that facts stated in it being taken as true, no decree de postponing the mortgage of Mars to judg- ed after it was made and recorded.

states in his answer that the mortgage to Mars consideration, and fraudulent and void. To

Mars was not bound to put in any defence. not be taken as confessed against him. If Whit- to impeach the mortgage of Mars, his course a cross-bill for that purpose. In general, one annot have any positive relief against another, a cross-bill. This is one of the offices of a

s answered, and the complainant brought the uring upon bill and the three answers, then the h directs (*Nix. Dig.* 110, § 38,) that in such case shall be taken as true in all points, might have and this answer of Whitney have defeated Mars. e result in *Vanderveer v. Holcomb*, 2 C. E.

case is not within that provision, and the inter- ree made by the court postponing the mortgage the judgment creditors, was not only irregular, ich the court had no authority to make. Mars

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and the petitioner, his assignee, have been deprived of their rights, without an opportunity of being heard, and without any laches or fault of either.

The petitioner having acquired a right in the subject matter of the suit since its commencement, is entitled to be made a party by the provisions of the act of March 17th, 1870, (*Pamph. Laws* 40,) and is entitled to have the enrollment vacated, and the decree opened, except as against the complainant, whose rights are not disputed, and who must be permitted to proceed and sell. The sheriff must be directed to pay into court the surplus of the proceeds of the sale, after paying the debt and costs of the complainant, and the costs of the sale. And the rights of the defendants can be settled upon application by either for the surplus money, or by cross-bill, as they may deem best.

TOMPKINS vs. TOMPKINS.

The time specified for the payment of a mortgage may be extended by parol.

This cause was considered upon the pleadings and proof handed to the court, without argument or brief from counsel for either party.

THE CHANCELLOR.

The bill is filed to foreclose two mortgages held by the complainant, both of which upon their face were then forfeited by the non-payment of interest, although the principal had not become due upon either. The defendant, in his answer, sets up a parol agreement entered into by the complainant, that if the defendant would lease the premises to M. and E. Stewart, by a lease binding them to repair the premises, and pay the interest on the mortgages, and the insurance on the building from October, 1867, until Apri

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1878, the term of the lease, he would delay enforcing payment of interest and insurance until June, 1868; that he did make such lease with such covenants; that the lessees began to make the repairs stipulated for, and expended several hundred dollars in such repairs; and that the complainant forbore the repairs were completed, and before June, 1868, died on the 26th day of January, 1868, commenced this suit to foreclose.

This agreement and the fulfillment of it is substantially proven as alleged in the answer. The lease was made, and J. and E. Stewart immediately proceeded with the repairs, and continued them until the latter part of November, when they suspended them on account of the cold weather.

Here is an agreement upon which the defendant and their lessees acted and expended money, and it is not equitable that the complainant should proceed with his foreclosure, and deprive them of the benefit of their performance. The agreement was by parol only, but it was beneficial to the complainant, and therefore on good consideration. The improvements on the premises had been washed away to a considerable extent by a storm, and in their situation they were a precarious security for his debt, and these repairs stipulated for, and in part made, would have made the security far better.

It is well settled that the time of performance of the stipulations of a sealed contract may be changed by parol. *For v. Bennet*, 1 *Green's R.* 171; *King v. Morford*, *Saxt.* 30; *Van Houten v. McCarty*, 3 *Green's Ch.* 141.

In the last case a parol agreement to extend the time for payment mentioned in the mortgage for five years, from 1837 to 1842, was declared effectual, and that the mortgage was, by reason of it, not due.

The bill in this case being filed before the extended time for the payment of interest had elapsed, must be dismissed.

Attorney-General v. Steward.

THE ATTORNEY-GENERAL and others vs. STEWARD
others.

1. On final hearing, upon bill and answer, a preliminary injunction be made perpetual where it appears from the pleadings that the defendants intend to do some act charged in the bill, which would be a nuisance to the public, or an injury to the complainants.

2. The affidavits to the bill and answer are not evidence at the hearing.

This cause was argued upon bill, answer, and replica without proofs.

Mr. J. Wilson, for complainants.

Mr. Kingman, for defendants.

THE CHANCELLOR.

The complainants ask to have the injunction granted in this cause upon the rule to show cause, as a preliminary injunction, (5 *C. E. Green* 415,) continued and made perpetual. To authorize this decree it must appear from the pleadings that the defendants intend to do some act charged in the bill, which would be a nuisance to the public, or an injury to the complainants. The bill charges among other things, that the defendants in their slaughter-house erected on the bank of the Assanpink, intend to slaughter large numbers of animals, and to discharge the blood into the Assanpink, which flows past or near the lands of the complainants, and that this blood would pollute the water, and render it offensive and unfit for use.

The answer of the defendants admits that they intend to slaughter one hundred hogs per day at certain seasons, and that if they find it impracticable to convert the blood into fertilizers, and dispose of it for that purpose, they intend to discharge it into the Assanpink. It further states that the blood would not amount to more than fifty gallons per day.

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d would be discharged at the rate of five gallons per
ur, mixed with seventy times its own bulk of water, and
at it would not pollute the waters of the Assanpink in any
preciable degree.

In the state of the pleadings, only those parts of the
swer which are responsive to the bill can be evidence in
r of the defendants, but all its admissions can be used
evidence against them. It must therefore be taken as
ablished, that in a certain contingency they intend to dis-
arge the blood of one hundred slaughtered hogs daily
o the creek. There is no proof of the quantity which
s would be in gallons, or that it would be diluted by any
antity of water, or that it would be harmless. All these
ts are new matters alleged in defence; and besides this,
ey are alleged in the answer as matters of estimate and
jecture, and merely assert the opinion of the defendants.
The affidavits to the bill and answer are not evidence at
e final hearing, and cannot be considered. I am of opinion,
I was at the application for the preliminary injunction,
at the discharge of the blood of one hundred hogs daily
o a stream of the capacity of this creek, must necessarily
llute the waters and render them unfit for use. The de-
dants must therefore be restrained from doing this act,
ich they allow their intention to do, and the injunction
st, by decree, be made perpetual.

CASES

ADJUDGED IN

THE PREROGATIVE COURT OF THE STATE OF NEW JERSEY.

OCTOBER TERM, 1870.

ABRAHAM O. ZABRISKIE, ESQ., ORDINARY.

BRAY and wife, appellants, and NEILL'S EXECUTRIX, respondent.

1. An account of the personal estate of an intestate, on application to an Orphans Court for sale of lands to pay debts, which refers only to an inventory filed in another state, is not a compliance with the statute, unless a copy of the inventory is annexed.

2. A final account settled in the probate court of another state, relating only to the personal estate of the decedent, is not evidence against devisees of the real estate in this state, who had no interest in the personal estate, and would not have been heard on the settlement of that account.

3. On application for sale of lands to pay debts, it is necessary that the Orphans Court should ascertain and determine the amount of the deficiency of the personal estate required to be raised by the sale of lands.

4. On such application it is necessary that the court should ascertain and decide that the personal estate which had come to the hands of the applicant, had been applied to the payment of debts.

5. When the applicant had received and sold lands devised by the testator, and which ought to contribute to the payment of debts, it is error to order lands of other devisees to be sold for the payment of debts paid by the applicant, without deducting the proportion the applicant ought to pay.

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6. Lands devised to a widow in lieu of dower, if accepted by her, are liable to their proportion of the debts of the testator.

7. Where an executrix to whom lands are devised for a certain time, neglects to apply for an order for sale to pay debts until her estate expires, and in the meantime enjoys the estate, and takes the rents and profits of it, she must account for the value of the estate so enjoyed, and deduct its fair proportion of the debts in ascertaining the amount to be raised from the other devisees.

8. If the day to show cause is less than two months from the date of the rule even by one day, the order to sell is erroneous, and must be set aside on appeal. And as this rule is the proceeding by which jurisdiction is acquired, this defect appearing on the record, would avoid the proceeding collaterally.

This was an appeal from an order of the Orphans Court of the county of Camden, made July 27th, 1868, directing part of the real estate of William Neill to be sold for the payment of his debts, and from an order made by the same court, October 12th, 1868, discharging a rule to show cause why the order to sell lands should not be set aside, granted on application of the appellant, October 9th, 1868.

Mr. P. L. Voorhees, for appellants.

Mr. Carpenter, for respondent.

THE ORDINARY.

William Neill, father of the appellant Catharine Bray, died in Philadelphia where he resided, March 27th, 1854. He left a will, of which he made his wife, the respondent, sole executrix. This will was proved and admitted to probate in Philadelphia, April 4th, 1854, and in the county of Camden in this state, August 5th, 1854. An inventory of the personal estate was duly exhibited in the office of the Register of Wills, in Philadelphia, May 8th, 1854; and the final account of the personal estate rendered by the executrix, under oath, December 30th, 1854, before the Register, was then or afterwards (when, does not appear,) allowed and decreed by the Orphans Court of the city and county of

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Philadelphia. That court is the proper tribunal for such allowance, and its decree upon this matter would be, in the courts of Pennsylvania, conclusive, except upon appeal. By this account, it appeared that a balance of \$1693.06 was due to the accountant, it being the excess of debts and expenses of administration paid by her above the assets which she had received.

The will bequeathed three specific legacies, and gave the remainder of his personal property on the premises which he occupied (a hotel in the city of Philadelphia) for the use of his wife while she occupied the hotel, and afterwards to his wife and daughter, Mary Ann. It devised one parcel of land in Camden county, to his son Robert, another parcel at Gloucester to his wife in fee, and the rest of his lands at Gloucester to his wife for her use and the maintenance of his minor children until the youngest should arrive at twenty-one years of age, and then to all of his children equally in fee.

Robert sold and conveyed his lot in fee, in 1860, and the respondent sold and conveyed her lot in fee, March 11th, 1868, since the decree in the Orphans Court at Camden.

The lands directed to be sold are those of which the use is given to the respondent during the minority of testator's children, and which, as well as the lot devised to her, she had occupied since testator's death, and of which she had received the income.

The application to the Orphans Court for sale was made May 28th, 1867, after the youngest child would have been twenty-one, and after the respondent's estate in these premises had terminated. The rule to show cause was granted on the day of application, and was to show cause on the 27th day of July, one day less than two months from the date of the order.

A copy of the account allowed in the Orphans Court of Philadelphia was annexed to the petition. The account of the estate exhibited under oath at the application, was annexed to the petition, and stated that "there is no personal estate, the same having been exhausted in the payment of

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debts, as per account in Orphans Court of Philadelphia annexed;" and that the account of the debts was the balance found due by said account and decree, \$1643.66, with interest from April 6th, 1855, which may be presumed to be the date of the decree, which nowhere else appears in the proceedings. The account, as allowed, charges the respondent with \$4000.16 as the amount of the inventory, and \$882 as the value of two hundred and eighty gallons of brandy not in the inventory. But the inventory was not annexed to the petition or account, and though among the papers in this court, it does not appear that it was before the court below at the making of the order.

The first objection which I shall consider is, that there was not exhibited to the Orphans Court on application for the rule to show cause, such account of the personal estate and debts, under oath, as is required by the statute. *Nix. Dig.* 855, § 15. The account annexed to the petition certainly does not comply with the statute; it says, there is no personal estate, the same having been exhausted in payment of debts. This might be said in all cases, as the statute requires that the personal estate shall all be first administered. The statute can only be complied with by a full statement of all the personal estate which the decedent left at his death, whether administered or unadministered, collected or not collected, and even if part has been destroyed by fire, or lost, without default of the executor. But this statement under oath refers to the account allowed in Philadelphia, a copy of which is annexed; such reference would be sufficient, if that contained a sufficient account of the personal estate. But on examination it only refers to an inventory filed there, except as to the brandy. As that inventory was not annexed, the question arises, is such reference a sufficient account? By the practice in our Orphans Courts for nearly ninety years, and the forms of proceeding as given in all the books of precedents, from *Griffith's Treatise*, in 1797, to *Nixon's Forms*, a reference to the "inventory" or "appraisement" for the amount of the personal estate, is taken as

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sufficient. But this, in all these cases, must mean the inventory required by our law, and exhibited and recorded in the office of the surrogate or clerk of the Orphans Court and therefore, in legal contemplation as well as in fact, before the Orphans Court. A reference to an account on file in the office of the clerk in chancery, or in a probate office in Nevada or Alaska, or in the vaults of the Bank of England, would not much enlighten the court or those interested in opposing the sale. This account, though nearer at hand, is no better until supplied. Nor does the oath state, either directly or by implication, that the inventory or account contained all the personal estate of the testator. It would seem that the chattels specifically bequeathed are in neither; and it may be that in Pennsylvania such specific legacies, if delivered, need not be included in the final account of the general estate. The account of debts and credits does not state that the debts for which the personal estate was paid out were the debts of the testator; and the charges for rent and gas paid, in the account allowed, at long intervals after the testator's death, may have been for rent of the leased premises occupied by him, bequeathed to the respondent as part of the residue of the personal estate, for which she, and not the estate, would be liable, and which would be readily allowed on an *ex parte* account if he had signed a lease extending over that time. I do not think the account exhibited is sufficient for either of the objects for which it is required, to show the court whether the rule to show cause should be granted, or those interested in the lands whether there was, in fact, ground for the application, so that they could intelligently determine whether they should oppose it or not.

The account stated in Philadelphia is binding and conclusive there, and must be equally so in this state. But it is like other judicial proceedings, binding only on those who are or could be parties to it. It was an account of the *personal* estate, in which the appellants had no interest. The only bequest to Catharine was the specific one of a silver

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soup ladle, which was not in the account. As devisee of the real estate, she could not be heard on that account. She had no interest in the personal estate there in question. That she had an interest because the account could be offered in evidence on the application for sale of lands, assumes the question. In the account as it stood primarily she had no interest, and could not intervene because incidental by it might affect her. Else the holder of a note not yet due, might intervene in a suit by a third person against the maker, because such recovery might sweep away the property and leave nothing for his debt. All persons interested in the personal estate as creditors, legatees, or next of kin, were or could have become parties to such account, and are bound and concluded by it, but no others are. There being nothing to show what persons are considered as parties to this account by the law of Pennsylvania, I must determine that question upon general principles applicable to such cases, and by analogy to the law of this state.

The next reason is, that the Orphans Court did not determine what was the amount of the deficiency of the personal estate to be raised by the sale of the lands. It is not directly required by the statute that the court shall ascertain and adjudge what is the amount of the deficiency. But it is required to determine whether the whole or only a part, and then what part of the decedent's lands, is necessary for the payment of his debts. It cannot determine these matters without determining what that deficiency is; and therefore, by clear implication, it is required to determine the amount. When land is sold in different parcels, the sale should be terminated whenever the required amount is realized, although the order may include more lands; and in this case it is particularly necessary, as the order directs that after the sale of the first two tracts there shall be sold, thirdly, *so much of* a tract described, containing nineteen lots, as shall be necessary to pay off *the said debts* of the testator, although the debts have not been ascertained. The Supreme Court, in the opinion delivered in *Stiers v. The*

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Executors of Stiers, Spencer 54, establish this doctrine; that on an order to sell lands for payment of debts; the case was removed from the Orphans Court to the Supreme Court, by certiorari, and their decision is authority in this Court, to which the revision of these orders was transferred by the present Constitution. The Chief Justice says: "In my opinion the order is erroneous, because the Orphans Court had not ascertained the extent of the deficiency, nor designated in the order the sum to be raised by a sale of lands."

The third reason is, that the court did not ascertain *and decide* that the personal estate which had come to the hands of the executrix, had been applied to the payment of debts. The statute (*Nix. Dig.* 856, § 21,) provides that no sale shall be ordered by the Orphans Court until the personal estate shall have been so applied; of course the court must examine into and decide this question before the order is made. It does not appear that they did either examine or decide it. It is as much a pre-requisite to the order, as that it should appear that the personal estate was insufficient for the payment, and it is as necessary that it should appear in their proceedings. An order simply for the sale of the lands, without appearing on the face of the proceedings that the personal estate had been adjudged insufficient, would be erroneous. It is equally so for the omission to determine as to its application.

This was expressly laid down and decided by Chancellor Mac Williamson, in *Wilmurt's Adm'rs v. Morgan*. In an opinion quoted by Chief Justice Ewing, in 4 *Halst.* 342, he says: "It was the duty of the court to examine and *ascertain* that the personal estate which had come to the hands of the administrator, had been applied by them in the course of administration, before making the order for sale." And Chief Justice Ewing, in delivering the opinion of the court in *The State v. Conover*, 4 *Halst.* 338, says: "It is the duty of the court, as a preliminary to an order for sale, to ascertain and *decide* not only that the personal estate is

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insufficient to pay the debts, but that such part thereof as may have come to the hands of the executor or administrator *has been* applied for that purpose." In *Stiers v. Stiers' Ex'rs*, above referred to, the Supreme Court re-affirmed the doctrine. In this case the court did not examine into and decide the question. But on the other hand, it is apparent that the specific legacies had *not* been applied to the payment of debts. It may not be necessary by the law of Pennsylvania in administration of personal assets, but the law of this state requires it before an order can be had to sell lands.

Another reason is, that the tract devised to the respondent should be made to contribute its share of the debt, and the order to sell should have been for the residue only. The statute, section 16, (*Nix. Dig.*, p. 856) requires such contribution. It does not say that it shall be made for lands devised to the executor, upon an order for sale obtained by him; but it is just and equitable that it should be so made, especially when as here the whole of the money to be raised will go to the applicant herself. Great injustice might be done if it was omitted, and without any other consideration it avoids the necessity of further litigation; an object which the law always favors. This was held in the case of *Liddel v. McVickar*, 6 *Halst.* 44, a case in this respect like the present. The administrator had paid all the debts, and conveyed away his share of the lands; and the court held that no order could be made to sell the lands of the other heirs to reimburse to him the share of the debts paid by him, which should rest upon the land devised to him.

It is no answer to this, that the land devised to her was in lieu of her dower; it was in lieu of dower, but she had the option to accept of it, or to renounce it, and claim her dower in the whole estate. She knew all the facts, and the amount of debts, and the situation of the estate, and made her election, and no doubt acted wisely. She retained the tract, and ever since the decree in this case has affirmed her election by selling it, and has thus put it out of the

Bray v. Neill's Executrix.

power even of a court of equity to relieve her from the election made under a mistake, by permitting her to renounce the devise to her.

Again: although it is settled that an executrix has a right to have lands sold to reimburse her for moneys advanced out of her own funds for payment of debts, and also in a proper case is entitled to interest on such advances, yet this is not a proper case to allow interest. The respondent has laid out of these advances by her own laches and fault. She alone had the power to apply for sale; her final account was settled April 6th, 1854, which then showed as clearly as it does now, the balance due her, and that there was no personal assets to pay it. The use of the lands decreed to be sold was given to her for about thirteen years. She took the rents and income for that time, and then applied for a sale of the lands to pay both principal and interest of the debt to her. The delay was for her own benefit only, and at the expense of the other devisees. She is not bound to account for these rents and profits to any one (except by way of contribution), but as a sale in 1855 would have paid the debt, and stopped the interest, she must not be allowed any interest on the advance so made.

The value of her estate for years in these lands which she accepted and has enjoyed, must contribute to the debt according to its value, as well as the reversion of testator's children; and in estimating that value, it will be equitable to deduct the interest of this advance from the annual income of the value. The order cannot be said to be erroneous on this ground; it does not direct that any interest shall be paid, or in fact any particular amount of principal. But interest is claimed in the account exhibited, and the order is understood by all parties as intended to provide for the interest. These facts show the necessity of adhering to the rule established by the Supreme Court, that the amount of the deficiency for which the sale is ordered should be ascertained and settled in the order.

The want of one day of the two months required in the

Bray v. Neill's Executrix.

order to show cause, is a fatal error. The Orphans Court is a court of general jurisdiction, and has clearly jurisdiction of the subject matter, that is, of the sale of lands for payment of debts. But it must have, besides, jurisdiction of the case, and it must acquire it in the way prescribed by the statute which gives the jurisdiction. That in this case requires that the day for hearing shall be two months from the date of the rule. The parties in these cases have no personal notice; they must get notice by hearing of the rule and advertisement, and are entitled to every day of the time allowed by law. There is nothing to cure the defect; the appellants had no knowledge of the application until after the decree was made. Their application to open the decree was no appearance in the cause; it was, like this appeal, an attempt to have the decree already made set aside, that they might appear and be heard. Were this the only ground, the order for sale must be set aside. This question is one of jurisdiction; most of the others could not be taken advantage of collaterally as against a purchaser to affect his title, but only on appeal to set aside the decree below. But if the Orphans Court did not acquire jurisdiction of the case, and that want of jurisdiction appears, as it does here, on the face of the record, the whole proceedings would be *coram non judice* and invalid.

The order must be set aside -

Collins v. Townley and Johnson.

FEBRUARY TERM, 1871.

COLLINS, appellant, and TOWNLEY and JOHNSON, respondents

The fact that the testatrix was ninety-eight years old at the time she made her will, in the absence of any proof of testamentary incapacity, or any fraud, circumvention, or undue influence in procuring the will, is not sufficient ground for refusing to admit the will to probate.

In case of a will made at such an age, in favor of a daughter with whom the testatrix had lived for years, her other children have the right to require it to be clearly proved that she executed the will, understanding it was her testamentary act.

When, however, they go beyond this, and continue litigation by a protracted inquiry into the capacity of the testatrix, it is in the discretion of the court to allow contestants' costs, or to allow costs against them.

This was an appeal from the decree of the Orphans Court of the county of Union, admitting to probate the will of Sarah Collins, deceased; and also from such part of the decree as refuses to allow the costs of the appellant, as creator before the Orphans Court. There was also a cross-appeal by the respondents, because the decree does not allow the respondents their costs in the Orphans Court, as against the appellant.

Mr. Williamson, for appellant.

Mr. Magie, for respondents.

THE ORDINARY.

The testatrix was ninety-eight years of age at the time she made the will in question. Upon an examination of the evidence, this appears to be the only ground for filing a caveat against the probate of her will. No unsoundness or debility of mind is shown of a kind that approaches to defect of testamentary capacity. Nor is there any proof of

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any fraud, circumvention, or undue influence in procuring the will. There is no ground to sustain the appeal against the admission of the will to probate.

The caveator is a son of testatrix; he resided not far from his mother, and knew her situation and capacity. More than one unsuccessful attempt to procure an inquisition of lunacy against her in the last years of her life, had been made and failed. Of all this he had full knowledge. The will gave the bulk of the property of testatrix to one child, and very little to her other children; yet this child was a daughter, with whom she had lived for many years, and who had taken care of her before and after she acquired her property, upon the death of her son, Hugh.

There may exist sufficient reason for examining into the validity of a will made by a mother in favor of a daughter, with whom she has lived for years, especially when the testatrix is of the age of Mrs. Collins. Her other children have the right to require that it be clearly proved that she executed the will, understanding that it was her testamentary act. When they go beyond this, and continue litigation by a protracted inquiry into the capacity of the testatrix, it is in the discretion of the court to award costs against them, or to refuse any allowance of costs, as they think the conduct of the contestant may justify, by the evidence in the case. The Orphans Court were of opinion that sufficient reason for continuing the contest did not appear, and therefore refused to allow costs. I concur in that opinion, and therefore affirm the decree in that particular also.

That court refused, under the whole case as before them, to decree costs as against him. In that judgment I also concur, though with some hesitation. There was sufficient in the case to warrant his asking for the full formal proof of the will in open court, but I think the contest was prolonged by him after he ought to have been satisfied. But as it is difficult to say at what precise point he ought to have been satisfied, the decree of the Orphans Court is perhaps the only safe disposition to be made of this question.

Van Houten's Executor v. Post.

The proceedings in the Orphans Court are in all things affirmed.

The costs on the appeal and cross-appeal in this court, must be paid by the respective appellants.

VAN HOUTEN'S EXECUTOR, appellant, and POST, respondent.

Under the act of April 17th, 1868, a wife was not a competent witness in a suit by or against her husband, but only in a suit by or against *her*. Being offered as a witness in this cause against the husband, prior to the passage of the act of March 17th, 1870, authorizing her testimony on behalf of any party to a suit, she was incompetent.

On appeal from the Orphans Court of the county of Passaic.

Mr. Williamson, for appellant.

Mr. Woodruff, for respondent.

THE ORDINARY.

The appellant, as executor of Rachel Van Houten, presented his account of the estate of the testatrix in his hands, for allowance. Post, the respondent here, filed exceptions to the account. On the hearing of the exceptions, Van Houten, the appellant, offered his wife as a witness to sustain a charge in the account to which Post had excepted. She was objected to by Post as an incompetent witness, being the wife of a party to the suit by whom she was offered. The court sustained the objection and rejected the testimony. The appeal is from this decision, which is the only question presented. This ruling of the Orphans Court was made on the 8th day of January, 1870.

As the law stood at the time of this decision in the

Van Houten's Executor v. Post.

Orphans Court, a married woman could not be a witness either for or against her husband. The act of March 18th, 1859, (*Nix. Dig.* 1044, § 34,) which for the first time permitted parties to be sworn, expressly provided that no female should be admitted as a witness for or against her husband. And the act of April 17th, 1868, (*Nix. Dig.* 1045, § 36), provided only for the admission of a married woman and her husband in suits brought by or against *her*. The provisions do not apply to suits by or against the husband.

The act of March 17th, 1870 (*Pamph. Laws*, p. 59), provides that the husband or wife of a party to any suit is competent to give evidence on behalf of any party to the suit. This witness, if now or hereafter offered in this suit, would be competent, but was not when offered and rejected. The decision of the Orphans Court on this point must be affirmed, and the proceedings remitted to that court.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY.
MARCH TERM, 1869.

DECOURCEY and others, appellants, and COLLINS and others,
respondents.

1. The statute relating to chattel mortgages requires, when some of the mortgagors live in and others of them live out of this state, that the mortgage shall be recorded in the counties in which such residents live, and also the county where the chattels are situate.
 2. A first chattel mortgage unregistered, is absolutely void against a second mortgage taken in good faith; and such second mortgage need not be recorded at all to give it priority over such first mortgage.
 3. An objection to an instrument as evidence, on the ground of a want of sufficient United States revenue stamp, comes too late after such instrument has been offered and received in the cause without opposition.
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This was a suit for the foreclosure of a chattel mortgage, given by Messrs. Little and Dana to Samuel G. DeCourcey and others, who were the complainants in the court below. This mortgage was dated on the 12th of April, 1866, and the chattels embraced in it were situate in the county of

DeCoursey v. Collins.

Camden. Little, one of the mortgagors, resided in the county of Union; Dana, the other mortgagor, resided in the state of New York. Messrs. Little and Dana were partners, and their place of business in this state was the county of Camden. This mortgage was registered in the Camden county clerk's office on the 29th of September, 1866, and in the county of Union, on the 2d of the following November.

On the 3d day of August, 1866, Little and Dana gave a second mortgage on these same chattels to the defendants in the court below, Collins, Atwater, and Whitin, for \$10,000 advanced at the time. These defendants, when they took their mortgage, had no notice of the prior one to the complainants. On the 11th of August, 1866, they caused their mortgage to be registered in the clerk's office of the county of Camden. It was never registered in the county of Union. When this mortgage of the defendants was first offered in evidence it was objected to on the ground that a stamp, such as was requisite under the laws of the United States, was not affixed to it. At a subsequent day the instrument was again offered in evidence, having upon it the certificate of an United States collector, that he had affixed to it the proper stamps. On the second occasion, the instrument was put in before the master without any objection being made on the part of the complainants to its reception.

The opinion of the Chancellor is reported in 4 C. E. Green 117.

Mr. P. L. Voorhees and Mr. Bradley, for appellants.

Mr. C. Parker and Mr. Keasbey, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

This is a struggle for priority between the holders, severally, of two chattel mortgages. The mortgage first in point of time is held by the appellants. But the appellees took their mortgage, *bona fide*, before the registry of the complainant's mortgage. They also recorded their mortgage

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first, in the county of Camden where the chattels were situated. Subsequently, the registry of the first mortgage was effected in both the counties of Camden and Union, which latter county was the place of residence of one of the mortgagors.

Under these circumstances, it is insisted by the appellants that this mortgage of the appellees has never been conformed to the act of this state concerning chattel mortgages, the imperfection being that it was not registered in the county of Union as well as in the county of Camden.

This objection is well taken. The requirement of the statute is that these instruments "shall be filed in the clerk's office of the county where the mortgagor, if a resident of this state, shall reside at the time of the execution thereof; and if not a resident, then in the clerk's office of the county where the property so mortgaged shall be at the time of the execution of such instrument." *Nix. Dig.* 613, *pl.* 28. In the present case, one of the mortgagors resided in the county of Union, in this state, and the other in New York. With regard to the former, the statutory requisition could be complied with only by a registry in the place of his residence; and as to the latter, a similar form was requisite in the county of the situs of the property. This is a remedial statute, its object being to discourage the placing of secret liens upon personal property, and this object is obviously promoted by requiring that these mortgages must be recorded at the places of the residence of all such of the mortgagors as reside in this state; and in the case of others, being non-resident, that there then must be likewise a registration in the county in which the chattels are situated. I have no doubt, therefore, that in this case the mortgage of the appellees would have been invalid as against any creditor of the mortgagors obtaining, *bona fide*, a subsequent lien on the articles mortgaged.

But the infirmity of the case of the appellants is, that they are not creditors obtaining a subsequent lien. They are prior mortgagees who have failed to put their mortgage on

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record until the lien of the second mortgage attached. These rights, consequently, are specifically regulated by the statute. The clear direction of the act is that a prior mortgage, unregistered, shall be "absolutely void as against" subsequent mortgagees in good faith. We are asked to say that this result shall not follow unless such subsequent mortgagee shall obtain a priority in the registration of his mortgage. But we cannot say this, because the statute says just the reverse. The statute prescribes but a single condition to give a second mortgage priority over a first unregistered mortgage, viz. *bona fides* in the party taking it; it is not, therefore, in the competence of the court to require the performance of a second condition, viz. that such second instrument must be put first upon the record. I altogether agree in the conclusion of the Chancellor, that by the true construction of the act in question, the first mortgage was entirely void as against the second one, and that consequently the omission to record the latter according to law, cannot affect the result of this controversy.

With regard to the objection that the mortgage of the appellees was not properly stamped, it is sufficient to say the merits of that point cannot be considered, as no exception was taken in proper time to the introduction of this evidence. It is a well settled rule that in order to exclude an instrument on this ground, the objection must be made at the time of the offer of such instrument as evidence in the cause. The existence of the rule is indispensable to the ends of justice. The present case is an example of its necessity, for if the defect now suggested had been pointed out at the time, the imperfection, if any such exists, could have been readily removed. This rule of evidence was declared in the Supreme Court, in the case of *Kinney's Adm'r v. Mettler*, which is not yet reported. The authorities seem entirely agreed upon the point. 3 *Parsons on Con.* (5th ed.) 340.

This consideration, therefore, renders it unnecessary to decide the questions discussed as to the proper construction of the several provisions of the stamp law of the United States, or to enter upon that still more important inquiry,

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constitutionality of such law so far as relates to
 rol it is designed to exercise over the proceedings in
 ts of the state. The decree of the Chancellor should
 ned.

affirmance—BEASLEY, C. J., CLEMENT, DALRIMPLE,
 OGDEN, OLDEN, SCUDDER, VAN SYCKEL, WOOD-
 9.

reversal—NONE.

s EXECUTORS, appellants, and RICHARDS, respondent.

est to a daughter, of the interest on a bond and mortgage, and the
 on certain specified shares of stock for life, with a direction that
 ry for her support the stock may be sold, and the proceeds of
 and the principal of such bond paid to her, leaves a contingent
 ndisposed of in such moneys and stock, which will pass under a
 esiduary clause.

controversy in this cause grew out of the second and
 uses of the will of Mrs. Margaret H. Clark, which
 these words :

ond. I give and bequeath to my daughter, Eliza Y.
 all my clothes and wearing apparel, together with
 re bed-room furniture, and also such of my silver as
 y select. And I direct my executors to pay to my
 ughter the interest accruing upon a bond and mort-
 ecuted by A. D. Tichenor, to secure the payment of
 usand dollars; and also the dividends declared upon
 res of the capital stock of the State Bank of Eliza-
 and if it shall be necessary for her support or com-
 pay to her so much of the principal of said bond and
 ge as shall be necessary therefor, or to sell the said
 nd pay the proceeds to her.

h. I give, devise, and bequeath all the rest and resi-
 my estate, both real and personal, to my son, James

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H. Clark, and my daughter, Eliza Y. Clark, to be divided ~~in~~ share and share alike, to them, their heirs and assigns ~~forever~~ ever."

Eliza Y. Clark, the daughter of the testatrix, married ~~Mr.~~ Mr. Richards, the respondent.

The opinion of the Chancellor is reported in 3 *C. Green* 330.

Mr. R. S. Green and *Mr. Williamson*, for appellants.

Mr. T. Runyon, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

This is a bill filed by the respondent, as the executor of the wife, one of the legatees named in the will out of which the present controversy arises. The claim which he makes is that he, as the executor and legatee of his wife, is entitled to one half of the shares of the bank stock, and to one half of the moneys due on the bond and mortgage, mentioned in the second clause of the will of Mrs. Clark. The corpus of the fund, it is admitted, remains in the hands of the appellants, no part of it having been used for the support of the wife or the respondent. The only question discussed was as to the meaning and legal effect of those clauses of the will which relate to the property in controversy.

On the part of the appellants, it was contended that the mortgage money, and the stock just referred to, were not intended to be embraced in the residuary clause, which divides the residue of the estate between the son of the testatrix and her daughter, the wife of the respondent. But this contention cannot prevail. The second clause of the will does not dispose of the entire interest in these monies and chattels, except on a contingency, and consequently the residue of them remained which must be embraced in the residuary disposition. The interest on the moneys, and dividends on the stock, were given to the daughter for life, with a provision that in case of necessity the bond

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his property might be devoted to her support. It is clear, that if the will had stopped at this point, this property would have gone to no person absolutely, under the will, except in case of the happening of the event of the necessity for its use for the maintenance of the daughter. Under such circumstances the remainder, after the expiration of the use given for the life of the wife of the respondent, could not have been embraced at all in the testament. But

cannot perceive how any doubt can exist, that such remainder is a part of the residuum of the estate to be distributed under the fifth paragraph of the will. Nor is there any difficulty in the suggestion that the legatee, Mrs. Eliza Richards, was not entitled to any part of the corpus of this property during her life, unless on the occasion of it becoming indispensable for her support or comfort. If this be the true construction, the result would be that she has the use of it for life, with a power to dispose of it by will. In my opinion Mrs. Richards, by force of the will of her mother, acquired a testable interest in this money and stock.

But I further agree with the Chancellor, that if this property is not comprehended in the provision relating to the residuum of the estate, it passed immediately upon the death of the testatrix to her two children, as her next of kin. The idea suggested, that the fact of intestacy was in suspense until the death of the daughter ended the uncertainty as to the existence of any residue in the property, is entirely unsupported by legal principles, or, so far as appears, by any adjudication. As to this part of her estate, the testatrix was intestate at her death, or else it is controlled by her will, and in either branch of the alternative the complainant below was entitled to the relief given to him.

The decree should be affirmed, with costs.

For affirmance—BEASLEY, C. J., CLEMENT, DALRIMPLE, DEPUE, KENNEDY, OGDEN, OLDEN, SCUDDER, VAN SYCKEL, WALES, WOODHULL. 11.

For reversal—NONE.

Tantum v. Green.

TANTUM, appellant, and GREEN, respondent.

1. A judgment creditor who has exhausted his remedy by execution, may proceed against the choses in action of his debtor, and a court of equity will set aside a fraudulent assignment by the debtor of such choses in action to enable the creditor to proceed against them.

2. Such creditor is entitled to have the mortgage debts due the judgment debtor collected by a receiver and applied to the payment of the judgment.

3. But it is not sufficient for the creditor simply to prove that the debtor made the assignment for the purpose of hindering, delaying, and defeating the collection of the judgment. He must show that the assignee participated in such fraudulent intent, or at the time he took the assignment had notice of facts and circumstances, from which the fraudulent intent of the assignor was a natural and legal inference.

4. If a purchaser has before him facts which should put him on inquiry, it is equivalent to notice of the fact in question, and where such fact constitutes a fraud on a third party, it will not protect the purchaser that he purchased for value.

The opinion of the Chancellor is reported in 4 *C. E. Green* 105.

Mr. Robeson, Attorney-General, for appellant.

Mr. Kingman, for respondent.

The opinion of the court was delivered by

DALRIMPLE, J.

The complainant having recovered a judgment against John A. Tantum, one of the defendants, in the Supreme Court of this state, and exhausted her remedy at law, filed her bill in chancery against the judgment debtor and his brother, Joseph R. Tantum, praying that certain assignments of mortgages, made by John to his brother, may be set aside as fraudulent against the complainant. The complainant's allegation is, that the assignments were not *bona fide*, but made with the fraudulent intent to hinder, delay, and defeat her in the collection of her claim.

Tantum v. Green.

It is not necessary in this case to decide whether, independent of the statute of 1845, (*Nix. Dig.* 116, § 81,) and the act to prevent fraudulent trusts and assignments, (*Ibid.* 297), a judgment creditor, after having exhausted his remedy at law, could maintain a bill in chancery to reach the choses in action of the judgment debtor, which are not subject to levy in virtue of an execution on the judgment. The case of *Swayze v. Swayze*, 1 Stockt. 280, only decides that a judgment creditor is not entitled to a decree setting aside a conveyance of real estate as fraudulent, where he does not show that he has exhausted his remedy at law, and where the judgment would have been no lien on the land if the fraudulent conveyance had not been made. The case of *Boung v. Frier*, *Ibid.* 465, is to the effect that the complainants in that case being only creditors at large, had no standing in court and no right to question the claims of certain judgment creditors. I do not understand the learned Chancellor to decide in either of the cases referred to, that after a judgment creditor has exhausted his remedy by execution a court of equity cannot afford him its aid and enable him to reach the choses in action of his debtor. Chancellor Kent, in the case of *Bayard v. Hoffman*, 4 Johns. C. R. 450, makes an elaborate review of all the law upon the subject, and inclines to the opinion that a court of equity may, after the creditor has exhausted his remedy at law, come in aid of an execution and compel the application of the choses in action if the debtor fraudulently assigned, to the payment of the judgment. 1 *Story's Eq. Jur.*, § 368.

But however this may be, by the statute of 20th of March, 1845, and the act to prevent fraudulent trusts and assignments, a right is given to the judgment creditor who has exhausted his remedy by execution, to proceed against the choses in action of his debtor, in order to obtain satisfaction of the judgment. The complainant in this case alleges that by means of the fraudulent assignments, which she seeks to set aside, an obstacle to her proceeding against her debtor's choses in action has been created, and insists

Tantum v. Green.

that it is the duty of a court of equity to remove the obstacles thus created. It seems to me that there can be no doubt of the complainant's right to the relief she asks, provided the assignments are of the character alleged. The complainant is entitled to have the mortgage debts due her judgment debtor collected by a receiver and applied to the payment of the judgment. If the defendant in the judgment has fraudulently made an assignment of these mortgages with intent to hinder, delay, and defeat the complainant in collecting her debt, she has a right to have the fraudulent assignments removed out of her way. But it will not suffice for her to prove simply that the judgment debtor made the assignments for the purpose of hindering, delaying, and defeating the collection of the judgment; she must go further, and show that the assignee participated in such fraudulent intent, or at the time he took the assignments had brought to his notice facts and circumstances from which the fraudulent intent of the assignor was a natural and legal inference. If Dr. Tantum, the assignee, is not a *bona fide* holder for value, he has no title as against the complainant to the mortgages assigned. A decree pro confesso has passed against John A. Tantum. Dr. Tantum, the other defendant, has answered, and in terms denied any fraudulent intent, and says, in substance, that he took the assignments and advanced the money therefor, not to enable his brother to hinder or defeat his creditors, but on the representation that his brother desired to raise money to pay the complainant's claim and his other debts in New Jersey, preparatory to his leaving the state, and that in consideration of the assignments he in good faith paid the whole amount due on the mortgages. I think the answer thus far responsive to the bill. But if the facts and circumstances admitted by the answer, and in proof, show that this defendant must have known of the fraudulent intent of his brother, or if those facts and circumstances were such as to lead legitimately and naturally to the inference of fraudulent intent of the debtor, the assignments cannot, as against

Tantum v. Green.

the complainant, stand. What a person knows may be locked up within his own breast; what he should know from prior state of facts, is a conclusion of law. If a purchaser has before him facts which should put him on inquiry, this is equivalent to notice of the fact in question.

Let us see under what circumstances Dr. Tantum took these assignments, and thus enabled his brother to convert all his available assets into cash and defraud the complainant of the amount of her judgment. The action of complainant against John A. Tantum was for breach of promise of marriage; and it is not denied that he had frequently declared his purpose not to pay any verdict which might be recovered against him, nor that *his* intent in making the assignments to his brother was to defeat the collection of the complainant's claim. The verdict in the suit at law was rendered at about ten o'clock of the night of the 7th of December, 1866, at Freehold. The defendant immediately thereupon left Freehold, passed through Allentown, where he resided, and the next day we find him in Camden, where he makes, executes, and acknowledges the assignments, puts upon them the stamps required by law, and proceeds to the residence of his brother at Wilmington, in the state of Delaware, where he arrives on the same day. He informed his brother that the complainant had obtained a verdict against him of near \$3000, which, with the expenses incident to the suit, he would not be able to pay unless his brother would assist him in converting his mortgages into money, declaring that he wished to leave New Jersey and embark in business elsewhere, and that he desired to realize the money due on these mortgages to enable him to pay complainant and his other obligations in New Jersey; and as a further inducement to his brother to advance the money, offered to throw in a horse and wagon worth \$350. Dr. Tantum accepted the offer, and on the following Monday, being the 10th of December, he paid the full amount of the mortgages, having to borrow \$4000 of the amount, and on the same day, before complainant had

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obtained judgment on her verdict, deposited the assignments in the clerk's offices of the counties of Mercer and Monmouth, in this state, to be recorded. Dr. Tantum knew of the pendency of the suit for breach of promise. Before the trial of that suit the defendant therein had married, and was at the time of the trial residing with his wife in a house belonging to her in Allentown, in this state. From the facts admitted to have been known by Dr. Tantum, one of two inferences could only have been legitimately drawn, either that John was anxious to dispose of his property, with intent to defraud the complainant, or that he was in distress to raise the money to pay complainant before she had even obtained a judgment. It was not a natural, reasonable, or probable inference, notwithstanding John's averment that he intended to pay the complainant, that he had the slightest intention of paying her. Dr. Tantum had no right to shut his eyes to all the surrounding circumstances tending in one direction, and rely on the unsupported statement of his brother that he intended no fraud, when a moment's reflection would have shown the contrary. Within twenty-four hours after the verdict, John had gone from Freehold to Wilmington, stopping on his way to have the assignments prepared, without knowing whether his brother would accept them or not—so anxious immediately to raise the money to pay a claim hitherto hotly contested, that he was willing to pay a bonus of \$350 to turn the mortgages into cash; and to be sure that he would have cash enough in hand he proposed to assign securities to an amount of some \$2000 in excess of the complainant's verdict, and scrupled not to have his brother borrow \$4000 in order to raise the amount. Though the doctor says John told him he wanted to pay all claims against him in New Jersey and leave the state and engage in business elsewhere, it does not appear that he intimated what disposition he expected to make of his family and the property of his wife, nor where he expected to go, or in what business to engage. Before having any settled plans for the future, before having been

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called upon by execution or otherwise to pay the verdict, his hurried departure from home and his anxiety to dispose of his mortgages at a sacrifice, under the pretence of a desire to pay with such unusual promptitude a claim the justice of which it does not appear he has ever admitted, were circumstances clearly showing fraudulent intent, no matter how many solemn asseverations he made to the contrary. If Dr. Tantum, blinded by his over confidence in his brother, failed to see the transaction as it would have presented itself to any prudent business man, upon him and not the complainant must fall the loss. It also appears in the case that very soon after the transaction was closed the doctor conceived some suspicion of the good faith of his brother, for we find that he took or sent the assignments the same day they were delivered to him to the proper clerks' offices to be recorded. Why this prompt action, unless at that early period, within a very short time after the money had been paid, the doctor feared that John did not intend to appropriate the money as he had declared he would? The fair inference is, that thus early, in order to secure the mortgages against the claims of creditors, the doctor thought it prudent to have the assignments recorded without delay. If his suspicions had been awakened a few hours earlier it would have saved him from a loss which, judging from his answer, it would appear must be inevitable, unless his brother will make good his declared intention of paying the complainant's claim.

The conclusion to which I have come is the same as that arrived at by the Chancellor, that though Dr. Tantum may not have had such knowledge of the intended fraud as to make his denial thereof perjury, yet he had notice of suspicious, unusual, and extraordinary circumstances, which should have put him on inquiry. That he paid full consideration for the assignments will not suffice. He must not only be a purchaser for value, but a *bona fide* purchaser without notice of the fraudulent intent of the assignor, or of cir-

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cumstances which should have put him on inquiry, and which were equivalent to notice.

The decree of the Chancellor must be in all things affirmed, with costs.

For affirmance—BEASLEY, C. J., BEDLE, DALRIMPLE, E,
DEPUE, KENNEDY, OGDEN, OLDEN, VAIL, VAN SYCKE L,
WOODHULL. 10.

For reversal—NONE.

BERRYMAN and wife, appellants, and GRAHAM, respondent.

1. Objection to a witness on the ground of incompetency, must be made when he is offered for examination, if the incompetency be then known. The adverse party will not be permitted to sit by and hear the witness examined without objection, and failing to make anything out of him, to interpose the objection to competency.

2. A defendant, ignorant of facts which entitle him to file a cross-bill, until the depositions of complainant's witnesses reveal such facts, if he files his cross-bill without unnecessary delay, cannot be deprived of the benefit of such facts at the complainant's instance, where he was willfully kept in ignorance of them by a person acting in concert with the complainant, and who had been recommended by complainant to the defendant as a trustworthy person in the transaction, but whose fraudulent conduct was the ground of the cross-bill.

3. Fraud in this case held to be established, but even if it was perpetrated without the complainant's knowledge, yet there was clearly such mistake as to entitle the defendant to relief in this court.

4. Proper parties are not always necessary parties, and where no objection to want of a party as a necessary party was made below, nor such want made a ground of appeal, this court will not permit such question to be raised, unless the party omitted is an indispensable party, and justice cannot be done without him.

The opinion of the Chancellor is reported in 4 C. E. Green 29.

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Mr. C. H. Voorhis and *Mr. Gilchrist*, for appellants.

Mr. L. Zabriskie and *Mr. J. Wilson*, for respondent.

The opinion of the court was delivered by

VAN SYCKEL, J.

The object of the bill filed by the respondent in this cause, was to foreclose a mortgage, dated August 23d, 1865, for \$9276.51, given by Berryman and wife, to Graham, upon Mrs. Berryman's farm. The cross-bill filed by Berryman and wife, seeks to have the mortgage set aside, and the notes of Berryman thereby secured, delivered up to be cancelled, on the ground of fraud in the consideration.

Berryman purchased for his wife from Graham, the lease of a dry goods store in the city of New York, and the stock of dry goods contained in it, for which he gave to Graham his six several promissory notes, dated August 23d, 1865, payable to the order of one Alexander Just, one for \$1695.-82, one for \$1724.98, one for \$1754.14, and three for \$1425.50 each, payable respectively in three, six, nine, twelve, fifteen and eighteen months. The contract was, that Graham was to sell the lease and the goods in the store, for the original cost of the goods, less ten per cent. The cross-bill alleges that in taking the account of the stock there was a fraudulent over estimate, both as to quantity and original cost of the goods, and avers that \$5000, which has been paid on the notes as they matured, was equal to the value of the goods at the contract price.

Graham, the complainant in the original suit, was sworn as a witness on his own behalf, without objection at the time, and was cross-examined by the defendants' counsel. At the closing of complainant's testimony, and before any evidence had been taken on the part of the defendant, objection was made to the competency of Graham, and testimony was taken after this by both parties. Had objection been made to Graham at the time he offered himself as a witness,

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there is no doubt that he would have been incompetent. The only question is, whether the objection came in time to exclude him.

The rule that witnesses shall be objected to at the time of their examination is designed, not only to enable the party offering them to remove the incompetency, if practicable, or to supply by other evidence the want of their testimony, as suggested in the case of *Neville v. Demeritt*, 1 *Green's Ch.* 334, and *Mohawk Bank v. Atwater*, 2 *Paige* 60, but rests upon another reason of greater cogency, which does not permit the adverse party to sit by and hear the witness examined without objection, and failing to make anything out of him, to interpose the objection to competency. The objection to Graham came too late to avail the defendants, and therefore his testimony cannot be excluded. Any other rule would lead to great unfairness in practice.

Greenleaf, in his first volume on evidence, states it to be the well established rule, that if the opposite party is aware of the ground of objection, he will not be permitted to examine the witness, and afterwards object to his testimony if he should dislike it; he has his election to admit an incompetent witness to testify against him or not, but he must make his election as soon as the opportunity arises, and failing to make it then, he is presumed to have waived it forever. In this case the incompetency of Graham was known to the adverse party at the time he was sworn, and he was bound to interpose his objection then. This point is expressly ruled in *Donelson v. Taylor*, 8 *Pick.* 390, and upon examination it will be found that the cases cited by the Chancellor are not in conflict with it. In the case of the *Mohawk Bank v. Atwater*, *supra*, it expressly appears that the interest of the witness was not known until some weeks after he was examined, and therefore no objection could have been made at the time of his examination; and in *Neville v. Demeritt*, *supra*, the Chancellor says, that the witness should be objected to at the time of his examination.

Berryman and his wife, who were wholly unacquainted

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with the dry goods business, were introduced to Graham by one Alexander Just, who claimed to have the necessary experience, and who was to conduct the business for the wife, if the purchase was made. The evidence in this cause shows, that a large portion of the goods sold to Mrs. Berryman was old and unsaleable, and that the price paid by her was far above their actual value, and the direct evidence and circumstances of the case are inconsistent with the belief that Graham did not participate in the fraudulent practices, by which the sale was effected. The quantity and cost price of the goods were ascertained by the employees of Graham, before the stock was transferred, and the measurements and cost prices of the goods were written down by Aitken, a partner of Graham. Mrs. Berryman took the goods at this measurement, with an abatement of ten per cent. from what this schedule stated to be the cost price. It seems very clear from the evidence that it was a hard bargain, by which Graham sought to put off on a woman who knew no more about the business than a child, an old, faded stock of store goods, at an exorbitant price, and if fraud can be fairly gathered from the evidence, she should be relieved.

Hornidge, Foy, and McGrath, three of Graham's clerks at the time the inventory was taken, swear distinctly that they marked the goods in excess of the true measurement, as well as the cost prices. They say that Graham did not tell them to do so, but it was understood that the goods were to be marked up in both quantity and price. They understood it to be a part of their duty, as clerks in the complainant's store, to mark up the goods; they needed no express instructions.

It is insisted that their testimony is not to be credited because they participated in the fraud; but if this rule is applied, few frauds can be uncovered, as it is necessary in almost all cases to resort to the testimony of those who, to some extent, aid in the imposition. These witnesses have nothing to gain by false testimony; they testify directly and

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positively to facts about which they cannot be mistake —n; their statements are true or willfully false. They could have had no conceivable object in perjuring themselves, except to injure Graham or assist Berryman, and in either case, they would have expressly stated that Graham directed them to commit the wrong. The very fact that they acknowledge their error is evidence of their truthfulness. They say that it was not an unusual thing for some mercantile houses to mark up their goods, and therefore they did not look upon it in its true light as a gross fraud. Foy says that the July inventory was correct, and that the August inventory, at which the defendants bought, was marked up from that. In this Foy is evidently mistaken, as appears by inspecting the two inventories, and as the July inventory was prepared for the purpose of selling the stock to some Jews, there is no reason to doubt that if the goods were marked up in August, they would also have been marked up in July.

Thomas Porter testifies that Just employed him to come to the store and assist in taking the inventory, and that during that week Graham met him somewhere, and said to him that he might consider himself in his (Graham's) employ. Why did Graham attempt to tamper in this way with a man employed by Just to look after Mrs. Berryman's interest? Was not this a covert offer of a bribe to Porter, not to look too carefully after false measures and unfair prices? Just being a poor inebriate, and Berryman and his wife being absent, there would have been no one to detect or expose the wrong. Graham attempts to explain this strange conduct by the cross-examination of Porter. Porter says Graham told him that the reason he might consider himself in Graham's employ was, because Just had old debts which he was afraid might lien on the stock. This reason is not satisfactory, and was evidently intended to prevent any suspicion in Porter's mind, because there was no pretence that Just had bought the goods and there could be no such danger. This reason assigned to Porter, taken in connection

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With the fact that Graham kept away from the store while the inventory was taken, is very significant. Here was a stock of goods to the value of almost \$10,000, which Graham had contracted to sell. He goes to the store and says to Gage, his foreman, take the account at exactly what the goods cost, and then carefully absents himself while the measurements are made and the accounts taken, though he is afraid Just's creditors may seize his goods, and he leaves three clerks, who are now said to be entirely unworthy of credit, to ascertain quantity and price. Porter, whose credit is not in any way impeached, fully corroborates the three clerks, by testifying positively that as soon as the inventory was completed he found short measurements, and that Just complained to Gage both of short measures and fair prices, and charged Gage directly with having worked up the cost prices. Gage admits that before Berryman took possession, Just said to Gage that the goods were worked up, and Gage said they were not; but Gage does not pretend that he made, or offered to make any examination to satisfy Just that he was mistaken, although they were in the store at the time. If the inventory had been fair and would have stood the test of an examination, there can be no doubt at all that Gage, when his own integrity was directly called in question, would have said: Sir, examine the bills and make the measurements for yourself; I will not rest under this imputation. But he did nothing of the kind; he contented himself with a quiet denial of the charge.

It appears from the testimony of some of the witnesses, that Gage was to have the proceeds of the sale after Graham realized a certain amount, and therefore Gage was directly interested in running up the prices.

It also appears that when Aitken was writing the inventory, Just charged that the measurements and prices were wrong, and Aitken immediately in two cases made a reduction, without the least examination. The charge made by Just impeached the whole inventory, and Aitken, if it had

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been an honest transaction, would have insisted upon an immediate inspection of the goods; this conduct raises a strong presumption that he made the correction for the very purpose of preventing investigation. Graham offered Just as a witness, and Just does not deny in his testimony that he distinctly charged both Gage and Aitken with fraud. The goods really belonged to Graham and Aitken as partners, yet Moore and other clerks in the store were given to understand that they belonged to Gage, and when they were sold to Mrs. Berryman the mortgage was taken by Graham alone, although Graham himself testifies that Aitken then owned and still owns one-half interest in the notes. Graham had a purpose in these things, and they are not explained in a way which is consistent with his good faith.

Graham states in his answer to the cross-bill, that he had been offered ten per cent. more for the goods than he received from Mrs. Berryman, but that he refused to sell for want of proper security; yet he sold to Mrs. Berryman for ten per cent. less than he had been offered, and took as his only security a mortgage on property he knew nothing at all about, either as to title, value or encumbrances, and without making the slightest inquiry about it, even of Berryman or Just. The terms of the bargain were half cash and the balance on mortgage; yet at the mere suggestion of Berryman, Graham consented to take a mortgage for the whole of the purchase price, on this property of which he knew nothing. Nothing but the greatest eagerness to carry to completion a most advantageous bargain would have induced such action on the part of Graham. There is a circumstance in this case which leads very strongly to the belief that Just was in complicity with Graham, and that he was to share in the profits of the sale. The last of the six notes secured by the mortgage in question, was not endorsed by Just until the twentieth day of June, 1867. That note was payable to the order of Just, and therefore could not be negotiated by Graham without the enderse-

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nt of Just. Why was that last note passed into the hands of Graham without the signature of Just on it? Is not fair to presume that Just intended to retain some hold on this note for his services in accomplishing the sale? Graham was a business man, and knew it was necessary to have Just's endorsement on it, and although he was on the witness stand he did not explain the omission.

What is there to outweigh the positive testimony of four witnesses, who are in a position to know of what they speak, supported so strongly by the circumstances referred to? The only testimony on the other side is that of Gage, Moore, Aitken, and Graham. Moore only speaks of what he did himself; he says he don't know that the goods were marked up; he did not do it. Besides, he was quite deaf and could hear but little that passed. Gage did not clear up the direct charge of fraud against himself when he might have done so, and neither he nor Aitken pretend to have measured the goods, or to have seen them all measured. Aitken and Graham purposely placed themselves in a position where they could swear they did not see the fraud committed.

The complainant insists that Mrs. Berryman should have brought up her defence sooner. She was no doubt kept in ignorance by Just, and she did not learn the names of the witnesses by whom she could prove the fraud, until the taking of testimony in this cause. It does not appear that she was in a position at any earlier time to seek for redress. As it cannot be denied that the equity of the case is with Mrs. Berryman, this court should not, unless constrained by very strong evidence to do so, discard the sworn testimony of four disinterested, direct, and positive witnesses, upon whose statements, if true, the clear right of the case can be reached. The weight of evidence establishes the fraud and fixes Graham with a knowledge of it. It would seem from the evidence before us, that the goods were marked up from twenty to forty per cent. above their true value and actual measurement.

But if the fraud was perpetrated without Graham's knowl-

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edge, there has been a mistake in the estimate of the value of the goods according to the contract between the parties, against which equity will relieve, and it should be relieved against under the bill as framed in this case. *Read's Admiralty v. Cramer*, 1 *Green's Ch.* 271.

The counsel of appellants insist that Aitken was a necessary party to these proceedings, and that they are entitled to the advantage of a want of necessary parties in this cause. It seems clear that Aitken might have been made a party to the bill of complaint; but proper parties are not always necessary parties. As the case now stands, the question whether he was a necessary party does not arise. No objection was made on that ground before the Chancellor, nor was the want of Aitken's presence made a ground of appeal in this case. This court therefore should not permit this question to be raised, unless the party omitted is an indispensable party, and justice cannot be done without him.

The complainants in the cross-bill are entitled to relief and to a credit upon the mortgage, as of the date thereof, of the amount at which the goods were estimated in excess of the contract price, to be ascertained under the direction of the Chancellor. In making such estimate, the goods are to be taken at their true measurement, and ten per cent. to be abated from their actual cost price. The case should be remitted with the requisite instructions.

The decree was reversed by the following vote:

For reversal—BEASLEY, C. J., BEDLE, CLEMENT, DAL-
RIMPLE, KENNEDY, VAIL, VAN SYCKEL, WALES. 8.

For affirmance—DEPUÉ, OGDEN, OLDEN, WOODHULL. 4.

McLaughlin v. Van Keuren and Schultz.

AUGHLIN and others, appellants, and VAN KEUREN and SCHULTZ, respondents.

When it is essential to enable the court to make a complete and final disposition of the subject matter of the controversy, a necessary party will be added at any stage of the cause, unless there are cogent reasons to the contrary. And the record will be remitted to the court below for that purpose.

The defendants having failed to make the objection of the want of a necessary party below, this question is not entertained on appeal for their benefit, but because the court cannot, with the parties before it, make a decision which will finally and properly dispose of the subject matter in controversy.

The opinion of the Chancellor is reported in 4 C. E. 187.

For Williamson, for appellants.

For Jacob Weart, for respondents.

The opinion of the court was delivered by
JAMES SYCKEL, J.

On the 23d day of August, 1866, William Van Keuren and Charles Schultz, the complainants, recovered a judgment in the Hudson county Circuit Court, against James McLaughlin, for \$3288. An execution thereupon issued against goods and lands, to which the sheriff made return that no goods or lands of the defendant could be found. Prior to the rendition of this judgment, the defendant, James McLaughlin, had conveyed all his real estate to his son, Michael McLaughlin, by three deeds, two of which dated May 19th, 1866, and the third July 9th, 1866, recorded July 12th, 1866.

The bill in this case was filed by the judgment creditors, to have the deeds, which were absolute on their face, declared to be mere mortgages to secure certain indebted-

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ness of James to Michael, which was alleged to be much less than the actual value of the lands conveyed, and to have a decree for a sale of the lands and the payment of the complainants' judgment, after satisfying the real claim of Michael.

The defendants, in their answer, admit that the first two deeds were given as security for moneys which James then owed his father, but insist that the deed of July the 20th was intended to be an absolute conveyance, and that at the time of the delivery thereof, James also agreed by parol, that the first two deeds should be absolute conveyances. In consideration of the last conveyance and the parol agreement, the father agreed to pay the son the sum of \$500, which it is alleged was paid on the 8th of October, 1866.

The case shows that James McLaughlin, by his deed assignment dated August 20th, 1866, three days prior to the recovery of the complainants' judgment, conveyed to one J. F. Mallory, all his lands and tenements, goods and chattels, bonds, notes, books of account, contracts, rights and credits, for the equal benefit of his creditors.

Mallory, the assignee, is not made a party to the complainants' bill, but no objection was made before the Chancellor on that ground, and the question is now presented whether the decree should be reversed and the record remitted to the Chancellor, because the assignee is not made a party to the bill.

It is the aim of courts of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree may be perfectly safe to those who are compelled to obey it, and also, that future litigation may be prevented. *Story's Eq. Pl.*, § 72.

The rule requiring the presence before the court of all parties interested, being essential to enable the court to make that complete and final disposition of the subject matter of the controversy, at which courts of equity always aim, will not be overlooked, if the objection is taken at an

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ge of the cause, unless for cogent reasons. *Cutler v. Tuttle*, 4 C. E. Green 549.

It is not intended to intimate any opinion as to the rights of the assignee in the subject matter of this controversy, but it is clear that this court should not proceed to a final decree disposing of that subject matter, without the presence of the assignee as a party to this suit. The defendants having failed to make the objection at an earlier stage of the case, it is not for their protection that this question will now be entertained, but because the court cannot, with the parties here present, make a decree which will finally and properly dispose of the property it is called upon to deal with in this case. If the decree of the Chancellor should be affirmed, an innocent purchaser at the sale under that decree might suffer great loss, and this court might be greatly embarrassed by it in the future litigation, which will most certainly arise out of the transactions disclosed by this case.

The decree of the Chancellor must be reversed, because the assignee was not made a party to the bill, and the record should be remitted, that the necessary party may be added.

The whole court concurred.

MARYOTT and others, appellants, and RENTON, respondent.

The bill in this case was dismissed, because the mortgage sought to be foreclosed was not due at the time of the commencement of the suit.

Mr. C. E. Scofield and Mr. John S. De Hart, for appellants.

Mr. J. W. Taylor, for respondent.

Maryott v. Renton.

The opinion of the court was delivered by
THE CHIEF JUSTICE.

The bill in this cause was exhibited to foreclose a mortgage given by the appellant, Maryott, to the respondent, Renton, bearing date the 12th of January, 1867, securing the payment of a certain note drawn by one John M. Jacobs, for the sum of \$6000. This note was overdue at the time of the execution of the mortgage. The complainant in his bill claimed to hold also a second mortgage on the same premises, dated on the 1st day of February, 1867, made to him by the respondent, to secure the further sum of \$9000. In the progress of the cause, however, it was admitted that the real sum due on this latter instrument, was \$3000.

Upon the merits of the cause, the principal ground of defence was, that a part of the consideration of the \$6000 mortgage was worthless, and that the appellant had been induced to accept it by the fraudulent representations of the respondent. There are certain other circumstances which it was claimed raised up equities in favor of the appellants, but I do not think it necessary to specify them, for I think it very clear that no part of this defence has been made out in the proofs. I have no difficulty therefore in coinciding, on the merits of the case, in the conclusion arrived at by the Chancellor, "that the evidence in this case did not sustain the defence set up by the defendant" the court below.

But a fact has been developed which I think must defeat this present suit of the complainant. That fact is, that at the time the bill of complaint was filed the moneys secured by the mortgages of the complainant were not payable, that is, the day of payment had not arrived. It is true that the \$6000 mortgage was payable on demand, the note to secure which it was given, being at the time of the execution of the mortgage past maturity, but the evidence I think shows very plainly that at the time of the giving of the second mortgage, an arrangement was made which had the effect to extend the time of the payment of the first. The

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Terms of this new contract were committed to writing by the parties, and were to the effect that the respondent would advance to the appellant the sum of \$9000, in addition to the sum of \$6000 already loaned, and would take a new mortgage for the whole amount of \$15,000, payable in one year, without interest. When the parties called upon their counsel to execute this agreement, it was suggested by him that it would be profitable to let the \$6000 mortgage stand, as in this way they would save the expense of a United States revenue stamp on the amount of money secured by it, and it was on this suggestion that the mortgage for the \$9000 was given. But this was a mere change of form, and there is not the slightest ground, so far as I have been able to discern, for a belief that the substance of the arrangement was altered in any particular. It is true that the respondent did not fulfill his part of the agreement, as he advanced only \$3000 instead of \$9000. But this breach of his agreement, it can scarcely be pretended, can lay any ground on which he can claim an exemption from his stipulation, that the money embraced in the \$6000 mortgage should run without interest, and that the principal should not become payable until the maturity of the second mortgage, which was the 1st of February, 1868. The complainant himself was examined as a witness, and he did not pretend that at the time of the execution of the contract it was in any wise altered, except as to the circumstance that the two mortgages were substituted in lieu of the one for \$15,000. I have looked in vain through the evidence for any fact which could discharge the respondent from his agreement to put off the time for the payment of the mortgage on which his bill rests. The result of my examination is, that I am forced to conclude that the complainant had no right to commence a suit to foreclose either of the mortgages held by him, prior to the 1st of February, 1868. This bill was filed on the 27th of August, 1867, and was consequently premature, and should be dismissed with costs.

The decree in chancery should be reversed, and the case remitted with proper directions.

The whole court concurred.

The State, Baird, pros., v. Baird and Torrey.

THE STATE, BAIRD, prosecutor, appellant, and BAIRD and TORREY, respondents.*

1. When an issue is made by the pleadings and proofs on the question of the right to the permanent custody of infants, the case addresses itself to the general authority of equity as the public guardian of infants.

2. In such a proceeding it is not the technical right of either parent which will control the decision, but the primary motive of judicial action will be the well-being of the infants.

3. In the exercise of its legal discretion, the court in this case gave no one of the children into the custody of each parent.

The opinion of the Chancellor is reported in 3 C. ~~195~~.
(Green 195.

Mr. Carpenter and *Mr. Browning*, for appellant.

Mr. F. B. Chetwood and *Mr. Williamson*, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

This is a controversy between husband and wife, respecting the custody of their minor children. The proceeding was commenced by the medium of an habeas corpus in the Court of Chancery, and on the preliminary motion already made to dismiss this appeal, this court vindicated its right of jurisdiction in the present form over the subject matter of this suit.

In stating my views and the results to which I have come, it is not my intention to enter upon any discussion of the voluminous evidence which has been laid before the court. In dissensions of this nature, it is one of the worst

*This opinion was delivered at March Term, 1868, but did not come to the hands of the reporter till too late for publication with the opinions of that term.

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res that the door of the private household must be
own rudely open, and its most sacred recesses exposed to
public gaze. It is a relief, therefore, to feel that duty
permit the veil to be re-drawn.

a epitome of the facts of the case is given in the
on sent up from the Court of Chancery, but I do not
it necessary for me to recapitulate even that general
nary. To the Chancellor's conclusions upon the mat-
of fact, in the main, if not altogether, I assent. Of
e there are three which are the principal ones, and upon
h the ultimate decision of the case, with regard to the
ts of the parties, must rest. First, the Chancellor holds

Mrs. Baird was not justified in the desertion of her
band. To this I entirely agree. The act was one which,
the eyes of every legal tribunal, must be regarded as a
ifest violation of morals and of law. The distempered
e of the respondent's mind from sickness, and her sub-
on to advice which, though meant as kindness, was
l injury, may indeed, in some measure, serve to palliate,
must prove greatly insufficient to vindicate her conduct.
his important particular the wife was conspicuously in
wrong. And yet, notwithstanding this belief, I further
e with the Chancellor, that judging from the testimony
whole, it is clear that the respondent would be a trust-
thy guardian of her children. Upon this subject I have
the least doubt. In that part of her conduct already
red to, I have said she greatly erred, but that act, re-
led as an infringement of the moral code, stands single,
am willing to believe, in the history of her married

I absolve her altogether, in my own mind, from the
r accusation brought against her, although I think her
band, under the circumstances, was naturally and per-
s inevitably led to a belief in her guilt. Throughout
general tenor of the testimony I discover many indica-
s that the respondent is a woman of amiable disposition
moral worth. It seems to me much to the credit of her
band that this is the estimation in which he held her,

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even after their unfortunate final separation. I have no doubt that these children if left with the respondent, would, in the course of their training, be surrounded by every proper maternal influence.

And again, in the third place, my conclusion entirely harmonizes with that of the Chancellor in this respect, viz. that the vindication of the character of the appellant, Mr. Baird, is by the evidence completely triumphant. I refer to his character both as a man and as a minister of the Gospel. As to the charges against him of the commission of positive crime, they are so entirely overcome and exploded by the testimony, as to leave neither doubt of his innocence, nor of the indiscretion of those who made the accusation. No candid person can examine this evidence and not be satisfied that there is not the smallest ground for a suspicion that Mr. Baird is not innocent of all and every part of the impure conduct so rashly imputed to him. I believe it is the opinion of every member of this court that he is entitled to come out of this trial without a stain upon him, as a man of morals and as a Christian minister. His character, in its varied phases of public and domestic life, has been laid open to the severest scrutiny; his letters, evidently written in moments of unreserve and in the candor of an unsuspecting affection, have revealed, not only his professional career with its attendant views, aims, and sentiments, but also the minute details of his feelings, though and conduct as a husband and father; nothing has been kept back; the developement is perfect; and I think from this entire disclosure the fair result is, that after bating the usual quantum for human infirmity, we have presented to a man imbued and guided by the purest religious inspirations, and actuated on all occasions by unselfish domestic affection. Much censure was cast on this appellant, on the argument, on the score of his disposition to embroil himself on mere punctilios with his congregations. It would be singular if in these years of arduous life, nothing could be found which would afford a subject for stricture or regret.

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I think it is clear that he must be a blind censor in-
, who could fail to perceive that the same tract of time
ents ample materials for praise and admiration. As a
d example of the truth of this last observation, I need
refer to the letter written by Mr. Baird to his wife
she had clandestinely withdrawn her children from his
e. In that affair it is impossible not to feel that the
llant was cruelly wronged and outraged, and yet the
r to which I refer is not only silent as to those wrongs,
runs over with affection, and appeals to the wife, on the
nd of all things sacred by laws human and divine, to
rn to the post of duty by his side. In my estimation,
letter could have been written only by the hand of a
stian gentleman.

pon these conclusions, then, that both Mr. and Mrs.
-d are proper custodians of these children, and that they
e unlawfully abstracted from their home by their
her, the question arises as to their proper disposition
n the ground of legal principles. In arranging this
d result the Chancellor appears to have been embar-
ed by the form of the proceedings; he declared that
legal right to all the children, except such as were
er the age of seven years, was in the husband, but that
a proceeding by habeas corpus he had not the power to
rd them to him. He felt himself at liberty, however, to
blish permanently the position of the children, placing
n in the custody of the mother, and permitting the
er to visit them on condition that he should not use
a privilege to deprive the mother of their custody either
persuasion or force. There is so much confusion in the
ks, and conflict of judicial sentiment respecting the au-
rity which may be exercised by virtue of this kind of
t, that it is not to be wondered at that there should be
plexity in the practical application of the doctrine, but
he progress of this cause it has been already decided
t in the opinion of this tribunal the present case came
re the Court of Chancery in such a guise as to appeal to

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its general jurisdiction over the interests of infants. It is upon this principle, therefore, that the case must be determined. Both the parties to this litigation have called upon the Court of Chancery to provide for the permanent custody of these infants, and such custody must be adjudged in accordance with those considerations upon which a court of equity acts in discharge of its responsible duty as the public guardian of minors.

As a matter of strict law, it cannot be denied that in this state, as at common law, the general rule is, that the claim of the father to the persons of his infant children, is paramount to those of the mother. This rule is so entirely axiomatic that it would be idle to cite authorities in its support. But this rule has only a subordinate application whenever a court of equity is called upon to exercise authority in that branch of its capacity just referred to. On such an occasion it is not the dry, technical right of father, but the welfare of the child, which will form substantial basis of judgment. The legal right of the father will not be passed by, except when, in the opinion of the court, the well-being of the child requires such supersession. The application under such circumstances is, obviously, an appeal to the discretion of the court: a discretion, which course is, as far as practicable, to be regulated by settled rules and admitted principles. In the exercise of such function the circumstances of each case must, of necessity become important elements entering into the grounds of decision. The character of the respective parents, the age, health, sex, and number of the children, and the pecuniary resources liable to contribution for their maintenance and education, are all considerations which should and must exercise more or less influence over the judicial result. In the present case, the duty of arbitrating thus between the claims of the rival parents, in view of the best interests of the children is felt to be one of painful responsibility. In common with every member of this court, I have felt oppressed with the weight and delicacy of the office, and now, my greater

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action is, the consciousness that if I have erred in my
visions, such error has not occurred, at least, from want
careful consideration of the subject. The judgment
I have formed is this: that the eldest child, the
daughter, who is now nearly of age, should remain in the
power of the mother, if she so desire; that the same disposi-
tion should, for the present, be made of the two youngest
children; and that the remaining three children should be
referred over to their father. Provision should be made in
the decree for the reasonable access of the parents, respec-
tively, to the children, and a privilege should likewise be
granted, that either party, in case of any material change
of circumstances, should be permitted to come into court
for further directions or assistance.

In forming these conclusions I have been influenced by a
variety of considerations, among which are the following:
that the custody of the youngest child belongs to the
mother by force of the statute; that the second is still of
an age greatly requiring maternal superintendence and care,
and can, as yet, be best trained in company with his
younger brother; that the pecuniary means of the father,
shown by the evidence, seem now to be somewhat nar-
row and precarious, and that these children now are, and
have been, well provided for; and that the eldest child is
so near her majority, that to compel her, against her
will, to abandon her present home and course of education,
to submit to a new and transient control, could not fail to
be highly prejudicial.

The decree should be reversed, and a new one entered
conforming to the views above expressed.

MER, J.

I concur in the views expressed by the Chancellor and
Chief Justice, in regard to the facts of this case. The
result, in my opinion is, that the father is entitled to the
custody and control of his children over the age of seven

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years, except that considering the age and sex of the eldest daughter, I think she should be permitted to choose with whom she will reside.

As the appellant, when he was deprived of his children, was, and still is domiciled in the city of Philadelphia, I do not think that our statutes necessarily apply to this case. If he had sought only, by means of a habeas corpus, to free his children from illegal restraint, he would have been entitled to such action by the Chancellor or a judge, and should have been protected in taking them to the place from whence they came, leaving their future disposition to be settled by the tribunals of that place. But he has appealed to the special power of the Court of Chancery of this state to regulate the condition of infants, and put his case on our laws. Under these circumstances, I concur in the decisions, that the youngest child shall for the present continue with the mother; and although I do not dissent from the decree ordered by the majority of the court, directing that the next oldest boy remain with her for the present, I think it right to say that I should have been better satisfied if he also had been committed to the custody of his father.

DALRIMPLE, J., dissenting.

The prosecutor was married to Adeline T. Baird, on the 20th day of September, in the year 1849, at Princeton, in this state. There are now living six children, the issue of this marriage. The oldest is a daughter, in the 17th year of her age. The others are sons, aged respectively 14, 12, 10, 8, and 5 years. The prosecutor and his wife lived and cohabited together from the time of their marriage till the 11th day of March, in the year 1862, when the wife abandoned the home of her husband in the city of Philadelphia, took with her the five oldest children, and afterwards located herself with them in this state, under the protection of her father. The sixth child was born within a few months after the desertion. The wife and children have

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continued to reside in this state, and the husband in Philadelphia, ever since the separation.

On the 18th of June, 1864, more than two years after the separation, the prosecutor filed in the Court of Common Pleas, of the city and county of Philadelphia, a libel for divorce from his wife, notice of which was duly served on her, and such proceedings were thereupon afterwards had, that a decree of divorce was made dissolving the marriage contract between the parties, on the ground that the wife had willfully and maliciously deserted her husband, and absented herself from his habitation without reasonable cause, and had persisted in, and continued such desertion for the term of two years and upwards.

On the 12th day of April, 1864, two years, one month, and one day after the prosecutor had been deprived of the custody of his children, he sued out of the Court of Chancery of this state, a writ of habeas corpus against his wife and her father, commanding them to produce the bodies of the said children, together with the day and cause of their being taken and detained. The father of Mrs. Baird made return to the writ, that the children were not detained in his custody, but that they were in the custody, charge, and care, and under the control and direction of their mother, and were living with her in Manchester, in the county of Ocean, in this state, in a dwelling-house occupied by the mother and children, and in which the mother was at house-keeping by herself with her said children. This return has not been traversed. The defendant, by whom it was made, is therefore out of the controversy. Mrs. Baird, by her return, admits the custody of the children, and produces them in obedience to the writ, and alleges two causes for their detention. The first is, that they are her children, and are of a tender and helpless age, and require the nurture and care of a mother; second, that their father has not the means of maintaining and educating them, and had not made the necessary provision for maintaining his wife and children for a large portion of his married life. For the purpose of

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supporting the latter allegation, she gives a connected history of the labors of the prosecutor in his profession, which is that of a clergyman, shows that he met with ill-success in every charge over which he was placed, and therefore, she says he was not, by means of his profession, able to support his family. The reasons for her separating herself from her husband she alleges are, his long and continued ill-treatment of, and cruelty and personal violence to her, and his immorality and impurity of character. Under the general charge of immorality, she, among other things, charges the prosecutor with frequenting houses of ill-fame, and consorting with lewd women, and that he behaved in an immodest, indecent, and unbecoming manner towards the female servants of his family. The prosecutor responds and says, that his children are no more helpless, and that they no more require the nurture and care of their mother than ordinary children of like ages, and denies the charges of inability to support his family, of immorality and impurity of character, and of cruelty to and ill-treatment of his wife.

Upon the issue thus formed a mass of evidence has been taken, most of which, in my opinion, throws no light whatever upon the real questions to be determined. It will be perceived that the point to be decided is, not whether the children are illegally restrained of their liberty, but the issue is so framed as to compel the court to decide whether, under the circumstances of this case, the father or mother of these children is entitled to their custody. The father contends that the law gives him the custody of his children; the mother sets up a counter claim; and the court must settle whether the right of the father or mother is paramount. That was the question which the learned Chancellor met and decided. The decree from which the prosecutor appeals is, that the custody of all the children of the prosecutor and his wife is awarded to their mother, that the children are to be at liberty to remain with their mother, and the father must be allowed to visit his children at proper times, and under proper limitations, on the condition

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he shall not use these visits to deprive their mother of custody of the children, either by persuasion or force. At the common law, the father is entitled to the custody of his minor children. That is the rule in this state, except in so far as it has been altered by the act of March 20th, 1861, and the supplement thereto, of March 15th, 1861.

Dig. 391. By force of the acts referred to, if husband and wife live in a state of separation, whether divorced or not, on habeas corpus the wife shall, if not an improper person, be entitled to the custody of the children within the age of seven years, until they shall attain that age, if there is a decree of divorce separating husband and wife.

which provides for the custody and disposition of their minor children. The statutes, in effect, declare that the common law shall remain in force, except as to children under seven years of age. It is not necessary to cite authorities in support of a rule so long and well settled. The law of nature and society concur in giving to the father custody of his minor children. In the case of *Foster v. Blinston*, 6 *Howard (Miss.) Rep.* 406, Chief Justice Key, in a dissenting opinion, says: "We are informed in the first elementary books we read, that the authority of the father is superior to that of the mother. It is the doctrine of all civilized nations. It is according to the revealed religion and the law of nature, and it prevails even with the fiercest savage, who has received none of the lights of civilization. The father is considered the head and governor of the family." In the case of *The People v. Mercein*, 3

422, Justice Bronson says: "It may be best that the mother should be declared head of the family, and that she should be at liberty to desert her husband at pleasure, and to take the children of the marriage with her. But I will not alter what the law ought to be; that prerogative belongs to the father. I will however venture the remark, even at the risk of being thought out of fashion, that human laws should not be very far out of the way when they are in accord with the law of God." Justice Elmer, in his charge to

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the jury in the case of *Magee v. Holland*, 3 Dutcher 88, says: "By the law of the land, a father, unless deprived of it by appropriate legal proceedings, has a right against all the world to the services and the company of his legitimate children; and no one, not even his wife, the mother of the children, has a right to deprive him of it. It is the duty of the wife to live with, and to take care of their children."

But there are exceptions to this rule, which are as well established as the rule itself. If the child be of tender years requiring the nurture and care of the mother, or if the father for any reason be, in the opinion of the court, an unfit custodian of his children, they may be taken from him and their custody awarded to their mother. The welfare of the children is to be regarded, and the court, in its discretion, is to see to it that they are placed in the custody of the father or mother, as may be most for their good. The discretion which the court is to exercise in regard to the custody of minor children, is not an arbitrary discretion, which has been well said to be the law of tyrants, but a judicial discretion, governed in each case by fixed rules and principles. In the well considered opinion of Chief Justice Sharkey, from which I have already quoted, he holds the following language, which appears to me to state correctly the law upon this subject: "The court may exercise a discretion for the benefit of the child and place it where its interests would be best promoted. But this must be determined by a judicial discretion, not captious, or unrestrained or arbitrary. And this discretion can only be exercised on a sufficient showing. But if, on the other hand, the father or guardian be a suitable person to have the child, then there is no discretion with the court. The court must, in such cases, regard the legal right. They are as much bound by it as by the law on any other subject. A different rule is destructive of the law; for if the court in all cases may award the child to whom it pleases, this would make the will of the court the law. It is in vain that the law is given the father the right to the custody of his child, and

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as also given him power to appoint a guardian, if a court judge, on habeas corpus may, of a mere arbitrary will, defeat these laws. This is the doctrine of all the well adjudged cases which have been cited; it is the dictate of reason. Nor does the law deprive the father of the right on slight grounds; there must be an *obvious* reason for preferring the mother, otherwise there is no room for the exercise of discretion." The prosecutor is therefore entitled to the custody of his children, unless their good requires that they should remain with the mother. What, if any, facts or circumstances appear in this case which will justify the court in awarding the custody of these children, or any of them, to the mother? What reasons does she assign for taking and detaining the children from their father, who is their natural and legal guardian? It is said, in the first place, that they are of a tender and helpless age, and require the nurture and care of a mother. No evidence has been taken to show, and it was not insisted on by counsel of defendant in the argument, that the children, or any of them, are sickly or of feeble constitution. They no more require the care and nurture of the mother than ordinarily healthy children of the same age. The bare allegation unsupported by proof, that they require the care and nurture of the mother, will not suffice to take the case out of the general rule. The next allegation is, that while Mrs. Baird lived with her husband, he did not sufficiently provide for his family, and has not now the means of supporting and educating his children. The prosecutor and his wife were, at the time of their marriage, without property, and had nothing on which to depend, save the personal exertions of the husband. I think the evidence clearly shows that he is possessed of talents and learning, by which he may earn a comfortable support for himself and children, and that the decided weight of the evidence is, that though never in affluent circumstances, yet he always provided his family a decent and comfortable support. It may be that his ill-success in his profession is fairly attributable, to some extent

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at least, to his many and oft repeated domestic troubles, for some of which he may not be alone to blame. I have no fear that these children, if given to the father, will suffer for the want of the common comforts and necessities of life, nor that their education, mental or moral, will be neglected. On the other hand, we must consider that the mother has no property, but is wholly maintained by the bounty of another. It is next urged that the prosecutor is of such immoral character and vicious habits, as to render him an unfit person to have the care and training of minor children. Without going into an examination of all the evidence applicable to this branch of the case, I shall content myself with simply saying what I conceive to be due to the cause of truth and justice, and that is, that the charges of profligacy and immorality, alleged by the wife against the husband, are unfounded, unsupported by any satisfactory evidence, and most completely disproved. In respect to the falsity of these charges, I do not think there can be ~~or~~ is but one opinion. There is not, then, anything in the circumstances, life, or character of the father, which should deprive him of the comfort, society, care, and education of his children. Through all his married life he seems to have done all in his power to promote the welfare and happiness of his wife and children. In my opinion, it would be the exercise not of a judicial, but an arbitrary discretion, to transfer the custody of these children, or any of them, from the father, where the law has placed it, and give it to the mother. In the case of *The Commonwealth v. Briggs*, 16 Pick. 205, Chief Justice Shaw says: "The court will feel bound to restore the custody where the law has placed it, with the father, unless in a clear and strong case of unfitness on his part to have such custody. The unauthorized separation of the wife from her husband without any apparent justifiable cause, is a strong reason why the child should not be restored to her."

It appears by a decree of a court having jurisdiction of the parties and the subject matter, that the desertion of the

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prosecutor by his wife was without any reasonable cause, but was willful and malicious. In the divorce suit in Philadelphia she was served with process, had full opportunity to appear and make defence, and I believe did appear, but the decree was against her. But aside from the decree, I do not think the reasons assigned by the wife for her abandonment of the home of her husband, are supported by the evidence. I have already disposed of the charges of immorality. Those of ill treatment of and cruelty to herself are not proved. True, she testifies to acts of personal violence which, if satisfactorily proved, might perhaps justify the separation of the wife from her husband; but I agree with the Chancellor in the belief that the feelings of hostility entertained by the wife towards her husband, have led her unconsciously to magnify the veriest trifles into acts of brutality and heartless cruelty. The prosecutor denies these charges of violence to the person of his wife, and details at length the occurrences out of which they took their rise. His story bears the impress of truth. I cannot believe, from the evidence before me, that Mrs. Baird left the home of her husband because her personal safety required it, nor because of any personal violence threatened or committed. It is alleged that her husband, shortly before the separation, charged her with an attempt to produce an abortion upon her own person. It is said on the one hand that the charge was without foundation, and was cruel, and showed a wanton disregard by the husband of the feelings of his wife. On the other hand it is affirmed that the real reason why the wife left her husband was because he had detected her in his attempted abortion. Without going into any discussion of the truth or falsity of the charge, I may say that I think no one can shut his eyes to the fact that the evidence upon which the prosecutor acted in making the charge fully warranted him in making it, and the circumstances were such as to call upon him to make a full, thorough, and searching examination of the nature and character of the medical treatment to which his wife, without his knowledge

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or consent, had been subjected. I am satisfied that in all his conduct in this regard he was actuated by the purest and best motives, and had he, under the circumstances, done less than he did, he would have become, morally at least, a *particeps criminis*. As a husband and father he was called upon to assert his authority to prevent what appeared to him to be an attempt to perpetrate in his house a crime of a most heinous character. He was awake to his duty, and performed it in a manner neither indiscreet nor unkind. His conduct in that matter, so far from going to show his unfitness for the care and education of his children, or his cruelty to or ill treatment of his wife, impresses me with the belief that he is a man of kind heart, good morals, and correct principles. Mrs. Baird has denied the charge on oath, and in that denial is supported by the physician who attended her at the time the alleged abortion was attempted. It is not now necessary to settle on which side lies the weight of evidence. I entirely agree with the Chancellor that the evidence on which the prosecutor acted, even with the contradiction of the charge before us (which he had not), would not, in a court of law, be deemed insufficient to support a verdict.

The conclusion to which I am forced is, that the decree of divorce in Pennsylvania is founded in fact, and that the wife had no reasonable cause for her desertion of her husband. For two years and upwards she lived in a state of separation unauthorized by law, though in the meantime her husband addressed to her the most touching letters that husband could write to wife, imploring her for her own sake, for his, and that of their innocent children, to return to the post of duty and honor. To these appeals she turned a deaf ear, and refused even to see the writer, though he had assured her that his arms were wide open to receive her, and that he was willing to forget and forgive. The prosecutor, after waiting over two years, commenced these proceedings. They in no wise alter the wife's course of conduct; she puts in a return to the writ, which shows that

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her feelings are hostile to her husband, and that she cannot do him common justice; then follow the proceedings for divorce. From the hour when the wife deserted her husband, and clandestinely took away the children without the knowledge or consent of their father, she has not for a moment relented, but has been determined to remain separate from her husband, and retain control of the children. I cannot under such circumstances, though she may be a kind and devoted mother, commit to her custody and training these children. To do so would be to expose them to influences inimical to their father, and the result would be, that when they arrive at years of discretion their affections would be alienated from him, and they would not entertain for him the reverence or respect due from a child to its parent. If in the end the mother shall succeed, and the rights of the father be disregarded, the example can only work evil. Admitting, as I cheerfully do, that both parents seek the best good of the children, I believe that when the excitement of the present controversy shall have passed away, the mother herself will admit that the proper place for the children is with the father, whom the law has designated as their guardian and protector.

Nor do I see upon what principle we can make a division of this group of children, between the father and mother. Are one-half to be given to the father, and the other half to the mother? True, the mother has succeeded in disregard of the rights of the father, in withdrawing the children from a foreign jurisdiction where they belong, to this state. Has she thereby acquired any rights? Why should the daughter be given to the mother? Because she is a daughter? Is there any principle of law by which the right of the father to the services and society of his daughter, is any less sacred than it is in case of a son? Suppose the daughter were the only child, would she, under the circumstances of this case, be given to the mother? Are the rights of the father in respect to that child in anywise impaired, because he has other children? I have failed to discern any reason

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for giving any of these children to the mother, which does not apply with equal force to all. It will be best for them to be kept together, and brought up under the same influences. Rather than separate them I would give them all to the mother. If the father is fit and competent to have the custody of his children, I cannot see upon what principle we can take any of them away from him. I do not think the statutes referred to apply to a case like this. It must be recollected that the wife has, in fraud of the rights of the husband, withdrawn herself and children from a foreign jurisdiction. Her legal residence up to the time of the divorce at least, was, and that of the children yet is, in a neighboring state. I do not think she can invoke the aid of our statutes and claim the possession of the child under seven years of age. To allow her to do so would be to allow her to take advantage of her own wrong. The statutes were designed for no such case. Can it be that a wife, by a fraudulent withdrawal of her children from Philadelphia to this state, contrary to law, can acquire rights which would not have been accorded to her if she had remained at the place of her residence? I think not. Nevertheless the prosecutor in his petition for the habeas corpus, only claims the custody of the children above seven years of age, and concedes the right of the mother to those under seven, and as the case has been litigated with the understanding on both sides that the statutes applied to it, I am not therefore now willing to make a case for the prosecutor which he has not made for himself, nor to make his claim broader than he himself has made it. To do so might lead to injustice. Nor do I think in a case like this, the court should be controlled by the wishes of the children. They were attached to their father, and he to them, when they were taken from him. It may be that after the lapse of six years their affections have been alienated from their father. If so, he should have the opportunity to win back their lost affections, and train them up to love, reverence, and respect him.

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The result to which I have come is, that the decree of the Chancellor should be reversed, and a decree made that the executor have delivered to him all the children except the youngest, and that that one remain with the mother until it shall attain the age of seven years; each parent to be allowed to visit the children at all proper times; neither, however, to take advantage of such visits to interfere with the custody of the children, as decreed by this court.

The decree was reversed by the following vote:

For reversal—BEASLEY, C. J., BEDLE, CLEMENT, DALLAMPLE, DEPUE, ELMER, KENNEDY, OGDEN, VAIL, WALES, WOODHULL. 11.

For affirmance—VREDENBURGH.



JUNE TERM, 1869.

MERRITT, appellant, and BROWN, respondent.

1. A party who would seek specific performance must be prompt in asking the aid of the court. Unreasonable delay will, of itself, be often a bar to a suit of this character.
2. Executed parol agreements to buy in property at a sheriff's sale for the benefit of defendants in execution, can be sustained only on the ground of fraud.
3. When the elements of the case are, simply, a purchase under a parol promise to hold for the benefit of the defendant in execution, such a transaction cannot be enforced either at law or in equity.
4. The defendant agreed by parol to purchase property at a sheriff's sale for the benefit of the defendant in execution; the latter, at the time of the agreement, assigning to him twenty-five shares of stock to make the purchase "more beneficial to him." It was also agreed that the defendant in execution should raise the purchase money, and take the property within sixty days after the sale. *Held*, that the defendant in execution having failed to raise the money and redeem the property for over two years, and having per-

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mitted, in the interim, the purchaser to improve the property, and in ~~some~~ respects use it as his own, had lost his right to enforce the specific ~~per~~formance of the contract. *Held also*, that the stock stood as collat~~er~~al security, and that the purchaser must account for its value, it having ~~been~~ sold by him.

The opinion of the Chancellor is reported in 4 C. *E. Green* 286.

Mr. Alward and *Mr. Williamson*, for appellant.

Mr. Gilchrist, Attorney-General, and *Mr. Bradley*, ~~for~~ respondent.

The opinion of the court was delivered by
THE CHIEF JUSTICE.

This bill seeks the specific performance of an agreem~~ent~~^{ent} alleged to have been made by the defendant to purchase, ~~for~~ the benefit of the complainant, certain lands which ~~were~~^{re} sold under an execution against him, issued out of the Cou~~rt~~^{rt} of Chancery in a foreclosure suit. The substantial facts up~~on~~^{on} which the complainant relies are, that at the sheriff's sa~~le~~^{le} referred to, enough had been rais~~ed~~^{ed} to satisfy all the mon~~ey~~^y due on the mortgage except a balance of \$9000, and tha~~t~~^t being anxious to save the residue of his property, he re~~quested~~^{quested} the defendant to buy it for him, who consenting, the complainant, "for that purpose and as a part of the purchase money," assigned to him twenty-five shares of stock, of the value of \$2500. It is thus shown that the purchase was made upon this arrangement, no one present at the sale being interested in making the property bring more than the amount due to the mortgagee. The inequity charged upon the defendant is, that he refuses to permit the property to be redeemed according to this agreement.

The general question as to the legality of parol trusts of this character, was discussed with much acumen upon the argument before this court. Among other topics, the con-

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sideration was very forcibly pressed, that it was of pre-eminent importance to enforce, with vigor, the statute of frauds in its application to sales made by public officers in pursuance of legal process. There can be no doubt that there is great weight in this argument. To permit, under ordinary circumstances, parol trusts to be set up by defendants in execution, against purchases at these sales, would, I think, be obviously subversive of the true interests of all parties connected with them. Perhaps no means could be devised more calculated to introduce distrust into the mind of buyers, and bring about a sacrifice of the property offered for sale. The admission of parties as witnesses in their own favor, coupled with the privilege of complainants to waive the oath to the answer of their adversaries, would largely enhance the evils to be apprehended from the introduction of such a rule in our equitable system. When, therefore, the elements of the case are simply a purchase, under a parol promise to hold for the benefit of the defendant in execution, I think such an arrangement, the statute of frauds being set up as a defence, cannot be enforced either at law or in equity. Such arrangements do not, in my opinion, fall within the doctrine which enables a court of equity to effectuate, in derogation of the statute, parol contracts touching lands on the plea of part performance. My reason for this view is, that in the instance now under consideration, the contract between the defendant in execution and the purchaser is, in no legal sense, partly performed. Such purchaser neither obtains nor holds possession of the premises purchased by virtue of his agreement to take the property in trust. On the contrary, he enters upon the land by force of the title vested in him through the deed from the sheriff, by operation of law. With respect to his possession, the defendant's contract with him is entirely nugatory; consequently, I am not able to perceive how it is to be claimed that such possession is, in part, an execution of such contract. It should also be observed that this rule, if adopted, would be disastrously broad, for it would em-

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brace every case of an agreement to buy in lands in behalf of a defendant in execution, no matter how free from oppression or unfairness the transaction might otherwise be. I think there are not any decisions in this state which sustain such a doctrine. In *Combs v. Little*, 3 *Green's Ch.* 31, the statute of frauds was not pleaded, and in that case, as also in *Marlatt v. Warwick*, 4 *C. E. Green* 439, there were the present circumstances of fraud upon which the judgment of the court rested. In the latter case, I have always understood the point now considered was not mooted in argument and was passed without adjudication by this court. I have remarked that in both of these cases there were facts and proof evincive of fraud on the part of the purchaser, and this, in my estimation, is the correct ground on which to rest the jurisdiction of equity to enforce these parol contracts. Whenever an agreement of this nature has been entered into and the purchaser has made use of it, or of any other contrivance, to obtain the property in execution for an inadequate price, or to the oppression of the defendant, the right to equitable relief is clear. The jurisdiction is founded on the sure ground that it is the province of a court of conscience to prevent the statute of frauds from being made productive of the very evils it was designed to suppress. But even in this class of cases, so important is it to maintain the utmost confidence in the efficiency of judicial sales, the purchaser should be protected against all pretences of trust by parol, unless his *mala fides* be proved by the clearest and most complete evidence. But where such demonstrative proof exists, and where the contract between the defendant in execution and the purchaser is not of such a character as to affect injuriously the rights of creditors, then, as has been already remarked, a court of equity will frustrate the contemplated fraud by enforcing the contract specifically between the parties.

But in the case now before us, this question does not in fact arise, as the statute of frauds has not been set up as defence, and the foregoing intimations of opinion have been

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designed to exclude any inference which might have been made, if the subject had been passed without remark, that other views were acquiesced in.

The defence set up in this bill rests upon two grounds: First, that although the defendant did, in truth, agree with the complainant to buy in the lands in question for his benefit, that a fixed time to redeem was limited by the terms of such contract; and second, that if no time was originally limited, still the complainant's right to enforce the trust has been lost by his own delay and laches.

As I regard the facts of this case, time was not of the essence of this contract between these parties. According to the defendant's representation of the transaction, the complainant agreed to relieve him of the burthen of this purchase within sixty days from the time of the sale. I have no doubt that both these parties supposed it probable that this would be done, but I have failed to observe anything in the proofs which appears to indicate that the complainant was to lose absolutely the right of redemption, if he failed to comply on the day specified. The property was bought in at a price arbitrarily agreed upon, and without any exact reference to its real value; it is clear that the complainant regarded it to be of a greater value than the sum so fixed; it would, therefore, be a very harsh construction of his agreement with the defendant, to say that it was the understanding that if he was not punctual to the moment with his money, his right to redeem was forfeited. I think it would require very plain language, or very strong circumstances, to justify such a conclusion. The general principle is, that time is not regarded in equity as material to the contract, unless it is made so by express stipulation, or it reasonably follows from the situation of the contracting parties.

But it is not necessary to pursue this subject in any further detail, for on the second point taken in the answer, I am clear in my conclusion in favor of the defendant. Whatever may have been originally the nature of the agree-

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ment, with respect to the point just considered, I have no doubt the Chancellor was justified in concluding that the complainant had lost the right by his own remissness, to call for a reconveyance of this land. The usual maxim is, that a party seeking specific performance must show himself ready, desirous, prompt, and eager, to perform the contract. Unreasonable delay will, of itself, be often a bar to a suit of this character. 3 *White & Tudor's L. C. in Eq.* 83. "And even," says Judge Story, in delivering the opinion of the court, in *Taylor v. Longworth*, 14 *Pet.* 172, "when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period, been a material change of circumstances affecting the rights, interests, or obligations of the parties; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust." I think in the light of these rules, it may be fairly said that the complainant has lost his equitable claim to the lands in controversy. Admitting that the time for redemption was not definitely fixed by the agreement, still he could not reasonably require the defendant to retain the property indefinitely for his benefit. His stipulation was that he would redeem in sixty days; he made no offer to fulfill this engagement until after the lapse of over two years. This delay is but imperfectly explained; it is far from being justified. In this interval the complainant permitted the defendant to perform many acts which appeared to show that he considered himself the owner of the land. He improved the property by fencing and ditching, and in other ways. He sold part of it. There is some reason to suppose that the complainant himself entered into a negotiation for a purchase of a portion of these same premises. It is true, there are some circumstances which would somewhat blunt the point of these facts, and there is also some ground to suspect that the complainant has not

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been very leniently dealt with by the defendant. But it would be useless to analyze the evidence on this subject, and shall therefore content myself with saying, that as there is enough in the proofs to sustain the conclusion of the Chancellor, this court, even if doubts are entertained upon the subject, ought not to disturb that conclusion. On the main point involved in the case, I shall therefore vote for the firmance of the decree.

Upon a collateral branch of the case, however, I think the plaintiff should have relief. I refer to the circumstances that he put into the hands of the defendant, at the time of entering into his contract with him, twenty-five shares of stock. This stock the defendant has since sold. I am unable to see upon what grounds the defendant can refuse to account for the moneys thus received. Both in his answer and in his testimony, when examined as a witness, he says, that "he understood" that if the complainant failed to take the land off his hands within the limited period of sixty days after the sale, the stock was to belong to him. Even if we could assume this as the fact upon this point, it may well be doubted, whether in equity he could retain this money. He does not deny that the land was worth the money which he paid for it, and it is clear that the complainant appraised it at a higher rate. In this aspect, then, this stock must have stood as a forfeit, in case of a breach of the contract by the complainant, for there is not the least reason to presume that either party regarded its value as the fair amount of damages which the defendant would sustain in case of a non-compliance on the part of complainant. This penalty, therefore, upon well known maxims, would stand in equity merely as security against loss. This circumstance of the case, therefore, regarded from the defendant's own point of view, would seem to fall within the principle that a court of conscience will prevent the inequity of a pure forfeiture. But, in point of fact, the proofs are overwhelmingly to the effect that there was no agreement that this stock should become absolutely the property of the defendant, in the

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event of non-redemption by the complainant within the period prescribed. It is true, that the defendant, both in his answer and in his testimony, says that he so "understood" from what passed between himself and the complainant. But then he states what did pass, and it thus clearly appears that his inference was not justifiable. His statement in his answer is in these words, viz: "that the said complainant, finding the said Brown was unwilling to bid off the said property, for the purpose of inducing him so to do, and to make the purchase more advantageous" to him the defendant "offered to transfer to him twenty-five shares of the capital stock of the E. S. P. Company, if he would purchase the property at \$9000." When examined as witness, the defendant stated that this was all that took place with regard to the assignment of this stock. I cannot perceive how, from this transaction, the intention of the complainant to forfeit the stock in any event, to be deduced. He does not offer to sell the land and the stock, but, on the contrary, the assignment is made for the express consideration that the property, i. e. the land to be sold by the sheriff, should be purchased for the sum of \$9000. It is also obvious that the "purchase" is made "more advantageous" to the defendant by the stock standing to him as his guarantee against eventual loss. Taking the facts from the lips of the defendant himself, I see no reason to say that it was the agreement of the parties, that this stock was either sold to the defendant, or was to be retained as liquidated damages for breach of such agreement. But even if the defendant had testified explicitly to this fact, I should have no hesitation in my conclusion, that the evidence before me manifestly proves the truth to be otherwise. The complainant explicitly denies that he ever made any such arrangement. Mr. Hand, the witness who was present when the agreement was entered into, says, "the stock was assigned as collateral security;" and another witness, Mr. Rolston, who drew the assignment, and who was at the sale, declar-

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that the stock was to be "as security to Mr. Brown for any risks he might run himself by doing this favor to Mr. Merritt. This is my understanding of it; I understood it from Mr. Brown, as my conversation was with him." These witnesses are, confessedly, men of good standing and of intelligence. That which they testify to is uncontroverted, except to the extent that it is gainsayed by the defendant himself, in the manner heretofore criticised. It was fair that the defendant should hold this stock as a pledge against any loss which might have fallen upon him by reason of his beneficence to the complainant. But it is not equitable that he should claim to forfeit that pledge, when he admits, by his refusal to permit a redemption of these lands on conscionable terms, that he has sustained no detriment whatever. The proof should be very clear, upon which so extortionate a claim should be permitted to prevail. The evidence has entirely satisfied me that this stock was assigned to the defendant substantially as collateral security, and that consequently, he should account to the complainant for its value, being the price he sold it for and interest; a proper allowance being made for any expenses incurred by him in enhancing its value while in his hands.

The decree should be modified in conformity with these views. The complainant should be allowed his costs in both courts.

The whole court concurred.

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SUFFERN and GALLOWAY, appellants, and BUTLER and BUTLER, respondents.

1. An agreement endorsed on a mining lease, and stipulating "that parties of the second part shall, at the expiration of two years from date hereof, pay unto the said W and D the sum of \$10,000 in lieu of ten per cent. agreed upon in said lease, then the said W and D shall make a good and lawful deed of conveyance for the above described premises in the within lease, &c." held to be an absolute agreement by the lessees to purchase the leased premises at the end of two years.

2. This being the plain import of the words of the contract taken in their ordinary sense, the court is bound to presume, in the absence of any allegation of fraud or mistake, that such was the real meaning of the parties.

3. When the language of a written contract is ambiguous, or otherwise doubtful, evidence from without is admissible to show the real intent of the parties.

4. But such evidence can not be admitted when the language is so clear and explicit as to leave no room for doubt as to its meaning.

The opinion of the Chancellor is reported in 4 C. Green 202.

Mr. Ransom and Mr. Bradley, for appellants.

Mr. Woodruff and Mr. A. S. Pennington, for responder.

The opinion of the court was delivered by

WOODHULL, J.

The appellants found their claim to relief wholly upon the instrument called the mining lease, the effect of which, they insist, is to give them a perpetual right to enter and to conduct mining operations upon certain lands of the respondents. Another agreement, stated to have been executed some days after, but bearing the same date as the lease and endorsed thereon, is set out at length in the brief not because anything was claimed under it, but for the purpose of raising and pressing upon the attention of the court

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a question of construction, which the appellants perceived to be vital to their case. It should be observed that there is no allegation in the bill that the endorsed agreement is in any respect different from what the parties intended it to be ; that there has been anything left out of, or added to it, through fraud or mistake. But taking the writing as it stands, the appellants endeavor to show that its true purpose and meaning was not to affect in any way the terms of the mining lease, so far as the respondents are concerned, but merely to confer upon the original lessees an additional privilege, which they might exercise or not, at their option ; and that they having, at the proper time, elected not to exercise it, the agreement has ceased to exist as a contract. If the appellants are able to maintain this construction, they may be entitled to the relief for which they ask ; if they cannot do this, the very foundation of their suit fails. For if the endorsed agreement should turn out to be absolute, and not in any sense conditional or optional, the inevitable effect of it will be to control and modify the stipulation of the mining lease, so as to restrict the operation of that instrument to the term of two years from its date ; a term which had already expired before the commencement of this suit. What then is the true construction of the endorsed agreement? Does it mean that the lessees were to pay the \$10,000 at the end of two years, unconditionally, or only that they were to do so in case they should elect to take the property? The language is, " that the parties of the second part shall, at the expiration of two years from the date hereof, pay unto the said William and Daniel Butler, &c., the sum of \$10,000 in lieu of the ten per cent. agreed upon in said lease, then the said William and Daniel Butler shall make, &c., a good and lawful deed of conveyance for the above described premises in the within lease, &c." Considering this instrument as standing alone, and giving to its words their plain and ordinary meaning, we have failed to discover in it anything to support the construction contended for on the part of the appel-

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lants. Its stipulations are that one party *shall pay*, and the other party then *shall convey*. The obligation to convey is made to depend upon the payment, but the obligation to pay, or in other words, to purchase the property at the end of two years, is made absolute and unconditional as clearly so as language could well make it. For while it is true that this writing is neither grammatically well expressed, nor skillfully drawn, it is equally true that the substantial parts of it, the terms of the contract, are so clear and definite, and certain, as to leave little room for construction. It is nothing to the purpose to say that the real meaning of the parties was that the payment of the \$10,000 should be conditional, and at the option of those under whom the appellants claim. The plain answer is, that we are asked not to reform, but to construe this agreement, and in the absence of any allegation of fraud or mistake, we are bound to presume that if such had been their meaning they would have used words proper to express it, or at least words which might, without doing violence to the laws of language, bear that signification. If they have failed to do this they have placed themselves beyond the power of a court to help them by construction. For while courts are always solicitous to ascertain and carry into effect the intentions of the parties, they can do this only within certain well established limits. "The rule of law," says Professor Parsons, "is not that the court will always construe a contract to mean that which the parties to it meant; rather that the court will give to the contract the construction which will bring it as near to the actual meaning of the parties, as the words they saw fit to employ will properly construed, and the rules of law, will permit. In other words, courts can not adopt a construction of a legal instrument which shall do violence to the rules of language, or to the rules of law." 2 *Parsons on Con.* 494, 4

The endorsed agreement then, taken by itself, can not be judicially understood to mean what the appellants contend for. Can it be so understood when considered in con-

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tion with the mining lease? It is urged on the part of the appellants, that these two writings, although executed at different times, are evidently parts of one and the same transaction, and should therefore be construed together, and with reference to each other, for the purpose of ascertaining from both the real intention of the parties; that considered in this way, their construction of the second will be found to be the only one not repugnant to the terms of the first; and that it is unreasonable, if not absurd, to suppose that of two agreements made and executed so nearly together as these were, between the same parties, written upon the same paper, bearing the same date, and relating to the same property, the second could have been intended to operate to the destruction of the first. The force of this argument depends entirely upon the assumption that the two agreements were not only executed as parts of one transaction, but that they were conceived at the same time. It would be absurd to suppose that the parties intended to grant a perpetual right, and at the same moment of time intended to restrict that right to two years. But if the second agreement had no existence, even in the minds of the parties, until after the execution of the other, as we think sufficiently appears from the statements of the bill and from the testimony, instead of being absurd or unreasonable, nothing would seem more likely than that the second agreement should have been intended to modify, in one way or another, the terms of the first. It is further urged by the appellants, that their construction, even if not appearing from the writings themselves to be the true one, must nevertheless be taken to be true as against the respondents, on the ground that, by their own acts and admissions, they are estopped from denying it.

Where the language of a written contract is ambiguous, or otherwise doubtful, such evidence is admissible, and may be very convincing to show the real intent of the parties. But to admit it when the language is so clear and explicit as to leave no room for doubt as to its meaning, would be to

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disregard the familiar rule, which, while it permits the introduction of evidence from without for the purpose of explaining, prohibits it for the purpose of contradicting or varying a valid written contract. 2 *Parsons on Con.* 57.

Not finding in either of these instruments, considering them separately or together, and in the light of the circumstances under which they were executed, anything to warrant us in holding the second agreement to be conditional or optional against the plain import of its language, and not being permitted in such a case to resort to evidence outside of the writings for the purpose of imposing upon them a meaning different from that which appears clearly on their face, our conclusion is, that the appellants have failed to make out their case, and must therefore be denied the relief which they ask for.

Other questions of much interest, relating chiefly to the execution and character of the contract called the mortgage lease, are treated of in the opinion of the Chancellor, and were fully and ably discussed before this court, but the conclusion we have come to on the question of construction which met us at the threshold of the case, renders it unnecessary to consider the others.

Let the decree of the Chancellor be in all things affirmed.
The whole court concurred.

CRANE and wife, appellants, and DECAMP and others respondents.

1. Where a deed, absolute on its face, is given as a security for the payment of money, by or for the grantor to the grantee, it will be held in equity that the grantee took the premises subject to redemption.

2. Upon an application for a specific performance of a contract, the court must be satisfied that the claim is fair, reasonable, just, and equal, in all respects.

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3. To determine these qualities, the court will look not merely at the terms of the agreement, but at the relations of the parties, and the surrounding circumstances.

4. A party seeking the specific performance of a contract, must show that he has performed, or been ready and willing to perform all the essential terms of his contract.

5. Time and modes of payment, attended by special circumstances of hardship and loss caused thereby, are circumstances to be weighed by the court in exercising a sound legal discretion.

6. The surrender of a written contract of sale, followed by acts inconsistent with the continuance of the same, such as negotiating a sale to another party by the surrenderer for the benefit of the surrenderee, held to be in equity a rescission of such contract.

Mr. J. F. Randolph and *Mr. Williamson*, for appellants.

Mr. Linn and *Mr. C. Parker*, for respondents.

The opinion of the court was delivered by

SCUDDER, J.

The facts in this case are stated in the opinion of the Chancellor, 4 *C. E. Green* 166, and it is not necessary to repeat them here. Such additional particulars as are deemed important will appear in the examination of the questions submitted to this court in the appeal taken by the defendants below.

By the decree, it is adjudged that Augusta Decamp, deceased, late wife of said Edward Decamp, was at the time of her death the equitable owner in fee of the lot of ten acres, by her conveyed to her sister, Eliza A. Crane, (formerly Scott,) described in said bill of complaint; that said lot was by her conveyed to her sister only by way of mortgage, and that her children, William S. Decamp, Allen F. Decamp, Edward F. Decamp, Susan A. M. Decamp, Alfred H. Decamp, Clarence A. Decamp, and Mary Ann Decamp, are now entitled to the same, subject to the tenancy by the curtesy of their father, the said Edward Decamp, and subject to and on payment of the sum of money hereinafter men-

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tioned, and to a conveyance thereof, if the money for which the same is held by said Eliza A. Scott, shall appear to have been, or shall be paid.

And it was further adjudged, that the said children are further entitled to a conveyance to them, in their own right, as tenants in common, and free from any right or claim of their father, to the tract of eight acres in said bill set forth and described, and set off to said Eliza A. Crane (formerly Scott); that the same was by the said Eliza legally sold, and agreed to be conveyed to the said Augusta Decamp for the price of \$6000, and if it shall appear that said sum has been duly paid to her, the said Eliza A. Crane and Lewis Grover, her trustee, ought to convey, and the said children are entitled to a decree that they do convey the same to them.

And it was further decreed that an account be taken and stated between the parties.

The appeal is to the entire decree, and we will consider the several matters therein adjudged in their order.

The first named lot of ten acres is held by the appellant, Eliza A. Crane, under a deed of conveyance from her sister, Augusta Decamp, now deceased, and Edward Decamp, her husband, dated March 3d, 1854.

This conveyance is absolute on its face, but it is evident from the facts proved that Augusta never intended to sell this lot to her sister, and that the title was given to Eliza as security for the payment, by the rents, of the money she had assumed to pay for Mr. and Mrs. Decamp, at their request, and for which she had given her individual bond for \$10,000 to Charles Jackson, jun., secured by mortgage upon this ten acre lot, and the eight acre lot of Eliza joined with this in the lease; and also as security for the payment of the purchase money of Eliza's eight acre lot which Mrs. Decamp had agreed to purchase for the sum of \$6000; and for all other liabilities which she had paid and assumed for them, or either of them.

A court of equity will give this deed effect according to

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he intention of the parties at the time it was made, and will accordingly decree that the appellant, Eliza A. Crane, look this ten acre lot subject to redemption by the respondents. This is familiar law. 4 *Kent's Com.* *141; 1 *Wash. Real Prop.* *479; *Youle v. Richards, Saxt.* 534; *Crane v. Bonnell*, 1 *Green's Ch.* 264; *Clark v. Condit*, 3 *C. E. Green* 358. This right to redeem has never been released or surrendered; consequently there is no error in the decree directing a reconveyance of this ten acre lot, upon payment of the amount secured by such former conveyance.

The second point in the decree, directing a conveyance of the eight acre lot of Mrs. Crane to the respondents, presents a different and more difficult question.

It is claimed that there was a contract for the sale of this lot by Eliza A. Scott to her sister, Mrs. Decamp, for the sum of \$6000, payable by the first arrangement between them, one-half in cash from the proceeds of the mortgage to Charles Jackson, jun., and the balance in equal installments, at four, eight, and twelve months, with interest; that afterwards, when Decamp received the money from Jackson, he paid Eliza \$900, retaining the remaining \$2100 for his own use; to which she assented, and agreed to wait for the payment of the same for six months, or a year, and for the remaining \$3000, the balance of the purchase money (\$6000) until after the rents of the mines had paid Jackson his \$10,000 and interest, when her said last payment should be taken from such rents. Decamp was to pay her interest for the same, half yearly afterwards; the payment of the entire sum of \$5100 was postponed until the payment of the bond and mortgage and interest, but interest thereon was to be paid as above stated.

These different agreements were verbal. But several months after (the parties do not speak definitely as to the time), the last arrangement was put in writing by the attorney of Mr. Decamp, and signed by Eliza A. Scott, alone. She says it was a proposition on her part which they have not complied with, and thereby it was forfeited. They say it was a

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contract for the sale of her lot upon the above terms. She says it was surrendered by them to her and destroyed by her. They say it was only sent to her at her request, without any consent to its destruction, and that, if destroyed, it is still a subsisting, valid contract, and they pray a specific performance.

Although the evidence is somewhat conflicting and uncertain, I shall assume that there was an agreement signed by Eliza A. Scott, of the purport claimed by Mr. and Mrs. Decamp, and inquire whether, with this admission, they are entitled to a specific performance of the contract. This is an application addressed to the sound, legal discretion of the court. There is no rule in equity more clearly established, than that upon an application for a specific performance of a contract, the court must be satisfied that the claim is fair, reasonable, and just, and the contract equal in all its parts. If these points are not established by the complainant he will be left to his remedy at law. *Seymour v. Delarue*, 3 Cow. 445; *Stoutenburgh v. Tompkins*, 1 Stockt. 332; *Fry on Spec. Perf.* *106; *Talbot v. Ford*, 13 Sim. 173.

In judging of the fairness of a contract, the court will look not merely at the terms of the agreement itself, but at the relations of the parties and all the surrounding circumstances. *Fry on Spec. Perf.*, § 239.

Let us examine these. Eliza A. Scott, at the time of the agreement, was unmarried, living in the most intimate relations with her sister and her husband. He was her agent in the management of her business, trusted by her and having her entire confidence. This appears by all the facts in the case. Under these circumstances he was held to the utmost good faith in all his dealings with her. He took advantage of this confidence to get her endorsements on paper, which he failed to pay, and put her thereby in pecuniary straits and difficulties. Her inducement to sell the eight acre mining lot was chiefly to raise money to relieve her from her embarrassments caused by these endorsements. They made an arrangement with her by which they secured

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her own lot from seizure for his debts, relieved it from existing encumbrances, and put the burden of \$10,000 of Decamp's debts upon her and her property, the payment being assumed and secured by her bond and mortgage. The unproductiveness of the mines at that time, and the uncertainty that the rents would be received to pay the bond and mortgage, cast the entire risk of failure upon her. She undertook to pay her bond in any event. They provided for the payment of the purchase money of her lot in part from the product of her own land, including her wood lot, and imposed responsibility upon themselves to pay anything, except as the rents of their mining lot might, if productive, contribute towards such payment. Notwithstanding her need of money at the time, as they knew, they extended the time of payment for her lot until after the rents should pay the bond and mortgage for \$10,000 to Jackson, and the interest; meanwhile she was to pay taxes upon the entire property. The result was, that at the time of filing this bill in April, 1860, six years after the lease was made, she had received over \$200 of the rents on her personal account, and had expended more than twice that amount for taxes. The bill was filed just as the property was becoming productive to her.

Before this, during the delay of payments, she had been obliged to sell other property, which she wished to keep, at a sacrifice, to meet Mr. Decamp's debts and her expenses.

The lease, bond and mortgage by which she thus bound herself, were prepared by Mr. Decamp's attorney, under his dictation; the amount of the mortgage increased from \$6000, originally agreed, without consultation with her, to \$10,000. These papers were brought to her, and she was hurried out of church by Mr. Decamp to sign the same hastily, without time for explanation or consideration, doing whatever

he requested her to do, not questioning his good faith. It thus appears that he used her confidence to make a very good bargain for the benefit of himself and wife, to her great detriment and loss.

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Not only was the agreement, under these circumstances, unfair and inequitable, but the respondents were in constant laches in its performance on their part. Mr. Decamp did not pay her the sum of \$3000 on account of the purchase money of her lot, as first agreed upon. He did not pay her the balance after payment of \$900, as agreed upon, in four, eight, and twelve months' installments. After he had induced her to wait almost indefinitely for the \$5100, by their last arrangement he does not pretend that he ever paid her one dollar of interest, although it was stipulated that it should be paid half-yearly.

A party seeking the specific performance of a contract must show that he has performed, or been willing to perform, all the essential terms of his contract. And it is material to consider how far the reciprocal obligations of the party seeking the relief have been fairly and fully performed. 1 *Story's Eq. Jur.*, § 736; *Thorp v. Pettit*, 1 *E. Green* 488; *Colson v. Thompson*, 2 *Wheat.* 336; *Fry on Spec. Perf.*, § 641.

While the time and mode of payment are not usually the essence of a contract, they may be made so by change in the subject matter, and by special circumstances of hardship and loss. *Alley v. Deschamps*, 13 *Ves.* 225; *Harrington v. Wheeler*, 4 *Ves.* 686; *Lloyd v. Collett*, 4 *Bro. C.* 469; *Benedict v. Lynch*, 1 *Johns. Ch.* 370; *Fry*, §§ 718, 719; 3 *Lead. Cas. in Eq.* 78., &c.

The continuing failures of the complainants to make payments, and the long extensions, were as they knew, vexatious and harrassing in the straits and embarrassments from which she was suffering, and they are circumstances to be weighed by the court in exercising a sound legal discretion.

Thus considering the relations of the parties and the circumstances of this case, I should be unwilling to decree a specific performance of this agreement, proposition, or writing, giving it all the terms and purport which the respondents claim for it, even if it were existing at this time.

But the case shows further that the complainants,

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Decamp and wife, abandoned any equitable right which they might have to enforce the specific performance of the contract for the sale of Mrs. Crane's lot.

This paper, after it was signed by Miss Scott, was given by her to her sister, Mrs. Decamp, and retained by her for some months, and then at the request of Miss Scott delivered up to her. The complainants do not explain why or how this was done, and give no rational account of the surrender of the only evidence of their agreement. They do not allege any fraud or deception; nor does it appear that they ever even demanded it of her again. Two years after it had been given up, March 2d, 1857, Decamp wrote to Miss Scott a letter, in which occurs the following: "Augusta is feeling some anxiety to know something respecting what claim she has to the mining property at Hibernia, as the article of agreement she once had of you was returned, I think, at your request." Here is no assertion of right, or demand for a return. It assumes that she has entire control, and asks what the rights of Mrs. Decamp then were.

The evidence shows further the considerations of the surrender of this paper: Mr., Decamp had failed to make his payments to her, Eliza; was pressed at the time for money for the payment of his debts. She was dissatisfied with the terms of payment that had been imposed upon her, and desired to sell her lot to raise money. She thought both lots would sell better together, and desired them to join her in selling their lot. They apparently consented, and he aided her to sell the entire leased premises to Edward L. Dayton, February 18th, 1858, for \$8000. By a secret arrangement with Dayton they reserved their lot, and provided for a reconveyance to Mrs. Decamp without consideration. Eliza signed the agreement with Dayton, and destroyed the other agreement at or about that time, supposing, as she says, it was of no further use. Dayton paid her \$1400 on account of the purchase money, and afterwards was compelled, by inability to make the payments, to give up the purchase.

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This \$1400 was used by her in payment of her liabilities for Mr. Decamp.

I consider the surrender of the agreement, and the subsequent sale of this lot by her, with their knowledge and part in the negotiation, a rescission of the contract for the sale of Eliza's lot. Their conduct in the negotiation is utterly inconsistent with their claim now as purchasers under that agreement. Even where the original agreement is under seal, it may be rescinded in equity by a parol agreement, evidenced only by conduct. *Fry on Spec. Perf.*, § 634; *Walker v. Whales*, 2 *Humph.* 119; *England v. Jackson*, 3 *Humph.* 584; *McCorcle v. Brown*, 9 *Sm. & Marsh.* 167; *Dominick v. Michael*, 4 *Sandf. S. C. R.* 426; *Hill v. Gomer*, 1 *Beav.* 540.

It thus appears, while Miss Scott was willing to sell her lot to her sister, Mrs. Decamp, and agreed to sell, yet the terms of the contract were unfair and inequitable, the payments were vexatiously and injuriously delayed, and that the contract for the sale of this lot has been rescinded. It would be most unjust and inequitable, after the property has become productive and increased in value, to compel the appellants to convey both lots to Mr. Decamp and his children; while it appears most equitable under the circumstances, that each party should have their own lot, subject to the lease, and entitled to the rents ratably during the remainder of the term, and that an account should be stated between them up to this time.

Let an account be taken of all the rents paid for the leased premises, and interest, from which deduct the taxes and interest thereon.

Apportion the balance of rents, after the payment taxes, in proportion to the value to the tenant under the lease, of the respective lands late of Augusta Decamp, deceased, and of Eliza A. Crane, (including her wood lot).

Charge the rents and interest to the party receiving such rents, and credit the taxes to the party who has paid the same.

Charge the respondents' share with the sum of \$9100 re—

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ved from Charles Jackson, jun., and interest on the same
m time of receipt.

Charge the appellants' share with the sum of \$900 re-
ved, part of the moneys paid by Charles Jackson, jun.,
and interest thereon from the time of receipt.

A further account must be taken of moneys advanced and
bilities incurred by Eliza A. Scott, (now Eliza A. Crane,)
and for Edward Decamp, and Augusta his wife, and each
them, at their or either of their request, and of the
dits to them or either of them, by payments on account
such advances and liabilities. The said Eliza A. Crane
also to account for the value of two hundred and forty
res of stock of the Charlottenburg Iron Company, if the
e has been received by her from Edward Decamp, and
posed of by her; or if she still holds the same undisposed
then said stock shall be re-assigned to said Edward De-
up, upon the adjustment of the balance of account
ween them.

Upon statement of the balances, the respondent, Edward
Decamp, will be entitled to receive the balance apportioned
the lot late of Augusta Decamp, deceased, in right of
l Augusta, to the date of her decease, and in his own
at since her decease, as tenant by the curtesy, subject
the charge and discharge above named; and the appel-
s, Eliza A. Crane, will be entitled to receive the balance
ortioned to her mine lot, and wood lot, subject to the
rge and discharge aforesaid.

Upon taking such account the amount received by Mrs.
one from Edward L. Dayton must not be charged against
, and the sums received by either party upon sales of ore
special contracts with the lessee, will not be estimated.

If it shall appear upon the statement of the account as
resaid, that there is a balance due from said Eliza A.
ane to said Edward Decamp, such balance shall, and it is
reby adjudged to be charged upon her mining lot of land
scribed in the pleadings, until such balance is paid.

The lot conveyed by Edward Decamp and Augusta his

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wife, to said Eliza A. Crane, mst be reconveyed by the appellant to said Edward Decamp, as tenant by the curtesy, and to the children of his deceased wife, in fee, subject to his curtesy, upon the adjustment of any balance against him, if any such there shall be, on the coming in of the master's report.

The decree of the Chancellor should be reversed upon the second point in said decree, directing a conveyance by the respondents of the lot of said Eliza A. Crane to the children of Augusta Decamp, deceased.

The whole court concurred.

NOVEMBER TERM, 1869.

HARRIS and others, appellants, and VANDERVEER'S EX-
ECUTOR, respondent.

1. An appeal will lie by force of the act of 1869, from a decree of the Prerogative Court in a matter of probate to the Court of Errors and Appeals.

2. Such act is not unconstitutional.

3. The peculiar quality of a constitutional court is, that it cannot, in its fundamental constitution, be altered by the legislature, nor in any other manner than in the mode prescribed in the Constitution; but an enlargement of jurisdiction is not such an alteration.

4. The phrase "as heretofore," in Article VI, section 1, of the Constitution, if descriptive of the jurisdiction of this court, has no important significance, as the jurisdictions of all the constitutional courts, by necessity, are established as they existed antecedently to the date of the Constitution.

5. The Prerogative Court is not, by its nature, a court of the last resort, and there is nothing in the present Constitution making it such.

The cases of *Hillyer v. Schenck*, 2 McCarter 301, and *Anthony v. Halst.* Ch. 627, commented on.

This was a motion to dismiss the appeal, on the ground that an appeal did not lie from a decree of the Prerogative Court.

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rt, and that the act of the legislature granting an appeal in that court was unconstitutional. The act in question may be found in the laws of 1869, page 84.

Mr. Williamson, in support of the motion.

Mr. Vroom, Mr. Wurts, Mr. Bradley, Mr. Shipman, and J. C. Parker, contra.

THE CHIEF JUSTICE.

By an act of the legislature of this state, approved the 1st of February, 1869, it is provided that "all persons aggrieved by any order or decree of the Prerogative Court, may appeal from the same" to this court, "in the same manner in all respects as now provided by law for appeals to the Court of Chancery." The present case is now before us by virtue of this provision, and a motion is made to dismiss this appeal on the ground that the statute so recited is in conflict with the Constitution of this state. The important question thus presented has been argued by distinguished counsel on both sides with pre-eminent zeal, ability, and ability, and this court has given it that full consideration which is due to every case involving the construction of that fundamental law which regulates and controls, in all its departments, the government of the state.

There are two primary principles which are always to be borne in mind in the discussion of every question touching the limitations of the authority of the legislature of the state.

The first of these is, that the legislative body is supreme, in every respect, except in the enumerated instances of constitutional restraints; and next, that such restraints cannot be imposed but by plain language, or by implication necessarily arising from the co-ordination of the several parts of the established system of government. It is evident, therefore,

that the present motion cannot prevail, unless it can be made plain to the mind of the court that some provision of the Constitution exists which prevents the assumption by the

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legislature of the authority to pass the act in question. In the opinion of the legislative and executive branches of the government, this power exists. That opinion is entitled to the utmost respect, and it can, with propriety, be superseded only when this court is convinced beyond a doubt, that it is founded in error or misconception.

The proposition to be considered then, is, not whether doubts exist as to the power of the legislature to enact the law in question, but whether it is positively certain that such power has been taken from them. I will examine the question in this light.

Section 1 of Article VI of the Constitution, is in the words following: "The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes, as heretofore; a court for the trial of Impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court; Circuit Courts; and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require."

And by the last clause of section 1 of Article X, it is further ordained that "the several courts of law and equity, except as herein otherwise provided, shall continue with the like powers and jurisdiction as if this Constitution had not been adopted."

These are the general provisions providing depositaries for the judicial power.

In an examination of these sections the first thing which attracts attention is this: that the instrument itself establishes certain courts. It does not leave that all important work to other hands. An omission in this respect in the Constitution would have left the judicial system without any fixity whatever. In such a state of things, the powers, jurisdictions, and even the very existence of the several courts would have been placed under the control of the legislature. They could have been altered or abolished by that body at will. But the convention had no such pur-

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pose as this, and they, therefore, enumerated the superior tribunals in which was principally to reside the judicial power of the government. By that enumeration, those tribunals became constitutional courts, that is, courts that could not be altered or abolished, except by an alteration of the instrument creating them. The peculiar quality of a constitutional court, or of any other constitutional establishment, is this, that it is not susceptible of change in its fundamental principles, except in some prescribed mode. Thus, for example, the nature of this court, or the nature of the Supreme Court, cannot be altered in any way but one, that is, by a modification of the Constitution itself. It is presumed that no professional gentleman would, for an instant, contend that the legislature could deprive the decrees and judgments of this court of their quality of being conclusive, or could take from the Supreme Court any of those prerogative writs by which inferior jurisdictions are superintended and regulated. The power to do this would involve the power to modify in essential particulars the constitution of these courts; a power not to be distinguished from an authority to supersede or abolish. It is entirely clear then that the legislature has not the competency to impair the essential nature or jurisdiction of any of the constitutional courts. To this extent, it seems to me, the subject is too plain for discussion.

And it is at this point that the controversy in this case supervenes; for it is insisted that the act of the legislature giving an appeal in this case has a two-fold operation, inconsistent with the Constitution; first, in extending the powers of this court; and second, in curtailing the power of the Prerogative Court.

First, then, in regard to its effects upon this court.

It is admitted, and is indisputable, that from the surrender of the proprietary government to Queen Anne, in 1702, to the present time, neither this court nor its provincial prototype, has ever claimed any supervision over the decrees of the Prerogative Court. The legislature has now

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extended the jurisdiction of this court to that extent, and the question is, whether there is anything in the Constitution plainly prohibitory of such an act.

Now it is obvious to remark, that in such a jurisdiction there is nothing inconsistent with the nature of this court. It is constituted expressly "a Court of Errors and Appeals in the last resort in *all causes*," and it is therefore undeniable that the placing a new class of cases within its control is in complete harmony with its structure. It seemed to be conceded indeed, upon the argument, that the jurisdiction now claimed was not incongruous with the general character of this court, and consequently reliance was mainly placed by the counsel of the respondent on certain terms made use of in the Constitution itself. The words thus alluded to occur in the phrase before quoted, *viz.* "The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes *as heretofore*;" the insistment being, that the expression "as heretofore," refers to the antecedent word "causes," and is thereby restrictive of the jurisdiction of the court. But in my opinion this construction is clearly inadmissible. I will state a few objections to this view, which to my mind are conclusive against it.

Thus, it involves a jurisdiction absolutely stationary and immovable in every court of the state. This results from the fact that it is impossible to increase the jurisdiction of any of the subordinate courts without, to the same extent, increasing the jurisdiction of the court of the last resort. Thus, if a new class of cases is brought by the action of the legislature, within the grasp of the Supreme Court or the Court of Chancery, that same class of cases, *ipso facto*, is put under the supervision of this court. It is not to be presumed that any one will contend that new classes of causes cannot, with legislative assent, be taken under the cognizance of the subordinate courts just referred to. I have said that the essential qualities of all the constitutional courts are indestructible and unalterable by the legislature.

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an extension of the jurisdiction of a court, such extension being in harmony with its character, and not being an appropriation on the inherent powers of any other court, is not within the constitutional prevention. Perhaps there is no constitutional court in this country, the sphere of whose jurisdiction is entirely beyond legislative extension. The nearest approach to this condition may, it is probable, be found exemplified in the several courts of the United States; but this absence of jurisdictional extensibility, so to speak, results, not so much from limitations prescribed to the courts, nor from the character of the tribunals themselves, but from the restricted nature of the scope of federal legislation. In the judicial system of a state, few things can be imagined more obstructive of the progress of society than courts with jurisdictions absolutely fixed. I have said that a contrivance is an anomaly no where to be found; it is vain to pretend to have ever existed in this country. From the earliest times, every session of the legislature has added to the subjects of judicature, and the jurisdiction of our courts has been adjusted to this ever varying condition of things. I will instance one case out of a multitude. In the year 1848, the legislature gave a remedy by action in cases of death resulting from a wrongful act or neglect. This was the creation of new causes of action. The Supreme and Circuit Courts have taken cognizance of this class of cases. Can any one pretend that this court should not finally adjudge the law of such cases? And yet it is certain that this court is barred of such jurisdiction, if the words "as heretofore" have the significance with which they are clothed by the counsel of the respondents.

But again, to look at the contention in its opposite aspect. Suppose we assume that the words "as heretofore" confine the jurisdiction of this court to the precise limits it possessed at the time of the adoption of the Constitution. Is the argument in favor of a dismissal of this appeal thereby strengthened? I am not able to perceive that such is the case. I hold it is entirely clear that the jurisdiction of this

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court was, before the constitutional epoch, susceptible of increase by the power of legislation. One or two historical incidents will show conspicuously the truth of this conclusion. By the 9th section of the Constitution of 1776, it is provided "that the governor and council (seven whereof shall be a quorum), be the Court of Appeals in the last resort in all causes of law, *as heretofore*." At this date, and all through the times of the provincial government, the Court of Chancery had existed as an independent tribunal. Originally the power of this important court was lodged in Lord Cornbury and his council; and subsequently by his ordinance to that effect, Governor Franklin took the office into his own hands exclusively. It was not until the 13th of June, 1799, that the act was passed giving an appeal from the Court of Chancery to the old Court of Errors and Appeals. When the Constitution, therefore, of 1844 was established, the jurisdiction of this court, so far from its being what it is now claimed to be, a jurisdiction utterly unchangeable, had been, and then was susceptible of enlargement by the legislature of the state. Accepting, then, the words "*as heretofore*" in the Constitution of 1844, as terms descriptive of the powers of this court, it seems inevitably to result that a capacity to expand now exists in this court, as it certainly theretofore had existed. Nor do I find any force in the argument that the extension of appellate jurisdiction over the Court of Chancery by the act just referred to was a usurpation on the part of the legislature, and in violation of the old Constitution. I am aware that Mr. Griffith in his Law Register, has expressed that opinion; but that opinion is certainly entitled to no weight whatever when opposed to the settled practice of the courts, and to the quiescence of the bench and bar of the state for a long series of years. Besides, as it strikes my mind, nothing can be more inadmissible than the notion that these words, "*as heretofore*," in our present Constitution, can be supposed to refer to a merely imaginary jurisdiction which had never, as a point of fact, existed. It seems to me self-evident that if

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to consider this expression as descriptive of the ancient institution of this court, and are to resort to it as a model which it is to conform in the future, we must look for a model among the realities of history, and not grope for one amidst the speculations of the closet, for it is evident that the entire subject would be open to the wildest conjecture if we assume that the phrase in question indicates a jurisdiction which had never been reduced to practice, but had existed solely in the minds of theorists. I conclude then confidently, that the judicial history of the state shows conclusively, that prior to the date of our present Constitution the jurisdiction of this court was capable of enlargement by legislative assistance. The consequence is, that if the phrase just quoted is to be taken as one of jurisdictional description, it does not indicate a court with fixed boundaries, but, on the contrary, one with an enlarging jurisdiction.

This phrase, therefore, construed even in this sense, does not militate against the validity of the act now under discussion.

And it will also be observed this same fact disposes of the objection broached on the argument, and which I think is entirely without foundation, that the old Constitution of this state was not possessed of the usual sanctions of such an amendment, and that it was consequently regarded as alterable by the legislature at their pleasure, and that it was on this ground that they arrogated the power to extend the jurisdiction of this court over the Court of Chancery. Admitting this assumption, it cannot affect our conclusions. In fact it is a circumstance which can be made of no importance in this argument, only, as it seems to me, by a confusion of ideas on the subject. For if, as I have just remarked, the words "as heretofore," investing them with all the force which is claimed for them, must, by logical necessity, be capable to a practical and not to a visionary jurisdiction already existing, it seems evident that it is a matter of perfect indifference, so far as this discussion is concerned, whether such jurisdiction had been the product of legisla-

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tive usurpation, or of rightful power. For all the purpose of construction, the only possible inquiry can be, what former jurisdiction of this court was in point of fact, what it ought to have been, nor whence it arose. As an historical fact, it cannot be denied that it had been a jurisdiction extended by legislation; all that the advocates of legality of the present statute claim is, a jurisdiction possessed of a similar capability of extension.

It is proper here, also, to observe that in my apprehension the constitutional phrase "all causes as heretofore" cannot, by any just mode of exposition, be interpreted to mean any particular divisions or classes of causes. It is not practicable, in my judgment, so to restrict their signification. If they do not embrace what they clearly signify, "all causes," to what trains of cases are they to be confined? Certainly, it cannot be contended that they relate to causes in law and equity alone, and omit ecclesiastical cases. This obviously cannot be their meaning, because it would not embrace all the cases admitted within the province of this court. By the act of the 12th of December, 1794, the Court of Chancery was vested with cognizance over cases of divorce and alimony. The manifestly branches of ecclesiastical jurisdiction, and consequently at the date of the present Constitution, the power to supervise in those matters existed in this tribunal. In the full possession then of jurisdiction in causes, some of which were legal, others equitable, and others again ecclesiastical, how can the constitutional expression, "all causes as heretofore," be held to point to any particular subdivision of cases? There is no part of the context by which the meaning of these words can be so controlled. I can see nothing in the instrument itself which will authorize the court to confine into narrower limits the generality of the expression.

Nor should it be overlooked, that by holding this phrase "all causes as heretofore," to be descriptive of jurisdiction as it then existed, they are imperfect even for that purpose; they will not properly describe that jurisdiction which the counsel

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respondents apportion to this court. I shall hereafter show that cognizance of causes with respect to the accounts of executors and administrators, was vested, at the date of our present Constitution, in the Supreme Court, and consequently, was supervised by this court. This branch of the jurisdiction of this court has been cut off by the Constitution itself, and is now in the hands of the Prerogative Court. How, then, unless an appeal is given from the Prerogative Court to this court, can it be maintained that the jurisdiction of this court is now as it was "heretofore," *i. e.*, as it was at the date of the present constitution?

In fine, upon this topic, I remark, that in my opinion this expression "as heretofore," is almost valueless as a phrase of jurisdictional description. In my apprehension nothing can be more evident, than that all the courts designated in the Constitution must of necessity be possessed of their certain jurisdictions. What is the jurisdiction of the Supreme Court, if it is not that power with which it was endowed at the time the Constitution was established? As the province of that court is not defined in the Constitution, by inevitable intendment its primitive constitution remains. Its jurisdiction, then, speaking as of the date of the Constitution, is "as heretofore;" and so is the jurisdiction of every other constitutional tribunal; and it is this jurisdiction which has been placed beyond the reach of the legislative power. But as I have already remarked, an aptitude for enlargement, from the inherent nature of judicial institutions, appertains to every constitutional court. And the consequence is, that when the Constitution vests power in a court "as heretofore," and declares that the several courts shall continue with like powers and jurisdiction as though the Constitution had not been adopted, the effect is, that the primitive powers of such tribunals remain inalienably established, while at the same time there is implanted in them that principle of development by which their cognizance may be extended over new cases as they arise, and which principle is a part of their very nature and constit

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tion. Looking at the subject, therefore, in either point of view, I have no doubt that the jurisdiction of this court is extensible at the will of the legislature, provided, by such extension, the province of no other court or department of government is intrenched upon or invaded.

This result introduces the next branch of the inquiry.

Second. Does the act in question, in a constitutional point of view, alter or impair the constitution or jurisdiction of the Prerogative Court?

This point was not much insisted on, and I shall dispose of it very briefly.

The Prerogative Court has constitutional sanction, and according to the principles already propounded, cannot be shorn of any of its inherent functions or substantial jurisdiction. Consequently, we must look at its constitution to ascertain if the law under review has such effect.

This court has always been possessed of certain branches of jurisdiction which reside in the ecclesiastical tribunals in England. Hence, it has ever been regarded as an ecclesiastical court, and therefore does not properly come under the denomination of a court of law or equity. And it is certainly somewhat remarkable, that in section 1 of Article X of the Constitution, which in express terms, clothes the courts with their ancient powers, this court is not included. The language is, "the several courts of *law and equity*, except as herein otherwise provided, shall continue with the like powers and jurisdiction as if this Constitution had not been adopted." This language will not, in strictness, comprehend the Prerogative Court, and from this omission an argument might be drawn that its powers and jurisdiction are not so fully guarded by the Constitution, as are those of the courts which are embraced within the description of the clause. But on this circumstance I shall at present place no stress, but shall consider this tribunal as established, perpetuated, and protected, to the full extent by the Constitution. The question then arises, is there anything in t

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history or nature of this court which will prevent its decisions from being made appealable?

At the time of the surrender of the proprietary government to Queen Anne, the whole of the ecclesiastical jurisdiction over New Jersey was reserved to the Bishop of London, excepting only the collating to benefices, granting licenses to marry, and the probate of wills, which were granted to the governor.

By the Constitution of 1776, the only ecclesiastical court that was preserved in our system was that of the Ordinary. That office being placed, as it had formerly been, in the governor of the state. In the act of the 16th of December, 1784, (*Pat. Laws* 59), it is declared "that from and after the passing of this act, the authority of the Ordinary shall extend only to the granting of probates of wills, letters of administration, letters of guardianship, and marriage licenses, and to hearing and finally determining all disputes that may arise thereon." By the same act, original jurisdiction in matters of probate and of administration, with an appeal to the Prerogative Court, was conferred on the Orphans' Court, a tribunal created for that purpose. By this and subsequent statutes, various powers of a most important character were vested in this subordinate court, such as the final settlement of the accounts of executors, administrators, and guardians, the partition of the lands of minors, and the sale of the lands of deceased insolvents. The superintendence of the exercise of these superadded functions was given to the Supreme Court by certiorari. Nor did the legislature hesitate to transfer to the Orphans' Court powers which the Prerogative Court had before exercised. An instance of this will be found in section 27th, in the act of the 13th of June, 1820, (*R. L.* 784), which provides that the powers and duties formerly exercised and performed by the Ordinary, relative to the admission of guardians for persons under the age of twenty-one years, should thereafter be performed by the Orphans' Court, subject to an appeal to the Prerogative Court. And in this same statute

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we find that the power to grant licenses of marriage is taken from this same officer. From these facts and others which it would be tedious to adduce, it is clear that a control was exercised by the legislature over this court, greater than any ever attempted to be exerted with respect to any of our other judicial tribunals.

The Constitution of 1844 then came into existence, establishing the Prerogative Court and giving it an appeal over every decree of the Orphans' Court. That large body of decrees of the Orphans' Court, in matters of accounts, &c., which formerly by certiorari had been removable into the Supreme Court, and thence into this court, were thus diverted into the Prerogative Court.

From this statement it will be observed that the legislature of this state have from time to time, in many important particulars, altered and regulated the jurisdiction of the Prerogative Court, and that the powers which that court now possesses is not altogether of an ecclesiastical character, but is largely made up of purely civil business, conferred upon it by legislative and constitutional grant.

Is there any thing, then, in the nature or history of such a tribunal as this, which should make its decrees final? I do not mean whether it is proper or politic that they should be so; but is such an incident necessarily inherent in the constitution of the court itself? If we regard it as of ecclesiastical origin, its decisions have no claim to conclusiveness. In the English system the decrees of the Prerogative Court are subject to review in the Court of Delegates. This has been the case since the time of Henry VIII. A Prerogative Court, then, is not and never has been, from its constitution, a court of the last resort. What, then, has so modified its nature as to bestow upon it such a character in this state? If I could perceive that from its organization, or the character of its jurisdiction, the decrees of this court must be unappealable, I should feel constrained to say that the legislature could not alter their nature and make them appealable. Under such circumstances, a modification of the efficaciousness of the decrees of such a court would to be

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alter, in an essential manner, the court itself. It would amount to an organic change in a constitutional tribunal. But I do not find any thing which leads me to conclude that the decrees of this court are or ever have been final in their nature, and consequently there is nothing in the statute now in question, which is calculated to detract from the Prerogative Court any of the powers which have been placed in it by the Constitution. The scope of its jurisdiction is not in any degree curtailed; all that is done is to deny to its decisions a quality which has never been claimed to appertain to such a tribunal. When we wish to ascertain the inherent powers of any of our superior courts, we look, of necessity, to their English models. How otherwise can it be ascertained what is the character and effect of a judgment of the Supreme Court of this state? By what other standard is the Court of Chancery to be measured? Is there any other test, then, to be applied to the decrees of the Prerogative Court? I know of none; and if we resort to this test, such decrees are plainly of an appealable character.

Nor does the consideration, that an appeal from this court has never heretofore been taken, weigh much with me against this view. In the absence of a statute authorizing such an appeal, the superintending power of this court would lie in abeyance. There is a precedent for such a course. Until the legislature intervened, as has already appeared, this court did not assume jurisdiction over decrees in the Court of Chancery. I do not incline to the view, that an appeal from the Prerogative Court to this court would have lain without the help of legislation. This court in many respects, both in matters of jurisdiction and practice, takes as its pattern the English House of Lords, a tribunal which does not entertain appeals in ecclesiastical affairs. To take such cognizance, is undoubtedly an amplification of the practice of this court, and such amplification could, properly, be effected only by the co-operation of the legislature. Under these circumstances a course of practice in this court, no matter how long continued, exhibitiv of the absence of

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all exercise of appellate powers, is not to be wondered at, nor does it press much against the act under consideration.

Nor can I regard this question as *res adjudicata*. The case of *Hillyer v. Schenck*, 2 *McCarter* 501, has no application, as the appeal in that case did not rest in legislative authority. As to the remaining case of *Anthony v. Anthony*, 1 *Halst. Ch.* 627, the grounds of judgment are left to conjecture, as they are not shown in the report, and it is quite impossible to say on what precise reason the court acted. The argument was *ex parte*, and appears to have consisted in a bare suggestion of the grounds relied on. There was a circumstance in the case, foreign to the present issue, upon which the court may have relied. Nor do I see how it can be maintained that this decision involved the construction of the present Constitution. It is true, that it was made after the present Constitution went into effect, but the appeal was taken before that event. The present Constitution preserves all actions antecedently pending, but as it could not validate one which had been erroneously commenced, the only question which could have been disposed of in the case referred to, must have been relative to the effect of the old Constitution of 1776. The appeal had been taken in 1843, and the question was, whether a right of appeal at *that time* existed. Whether it existed by force of the Constitution of 1844, had nothing to do with the inquiry. A precedent so obscure and uncertain, ought not to preclude this court in the exercise of a free judgment in so important a matter as that now under consideration.

My conclusions, then, are as follows:

First. That this court, like all other constitutional courts, has not an inflexible jurisdiction, but that such jurisdiction can be extended by legislative action.

Second. That the Prerogative Court is not, by its nature, a court of the last resort, nor has it been made such by the Constitution of this state, and that consequently its decrees may be subjected to the superintendency of this court.

The motion to dismiss this appeal should be denied.

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VAN SYCKEL, J.

The question in this case is, whether it was within the power of the legislature to pass the act of February 17th, 1869, (*Laws of 1869, p. 84,*) giving an appeal from the decree of the Prerogative Court.

The legislative power must be conceded, unless some provision can be shown in the Constitution of this state, which expressly or by necessary implication operates as a restraint upon it. Such limitation is claimed to exist in Article VI, section 1, in these words: "The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes, as heretofore."

At the time of the adoption of the first Constitution of this state, July 2d, 1776, no right of appeal to the court of last resort existed in equity cases. In that Constitution it was provided "that the governor and council (seven whereof shall be a quorum) shall be the Court of Appeals in the last resort in all causes of law, as heretofore."

In 1799, twenty-three years after the adoption of this Constitution, and while the force of the words "as heretofore," must have been well understood, the legislature passed an act giving an appeal from decrees in chancery, and in 1820 extended that right to cases not within the act of 1799. Under these acts the right of appeal from chancery was maintained, without being questioned in this court, from 1799 to the time of the adoption of the new Constitution in 1844. Whether the act of 1799 was in violation of the old Constitution, is not necessarily involved in the discussion of this case.

The virtue of these words, "as heretofore," to operate as a restraint on legislative action, had received, before 1844, an interpretation which had been acquiesced in for forty-five years. The legislature had claimed and exercised the right, notwithstanding these words, to extend the right of appeal to cases in which such right did not exist at the time the first Constitution was framed.

When the convention which framed the Constitution of

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1844 incorporated in it the words "as heretofore," they must have done so in view of the construction which had been put upon those words, in view of the fact so well known to the learned lawyers who participated in the proceedings of that convention, that notwithstanding those words, the legislature had, under the old Constitution, extended the right of appeal. It is impossible to believe that words which had received such fixed interpretation would have been employed by the framers of our new Constitution, if it was their intention to exclude the legislative power. If they had deemed the act of 1799 unconstitutional, they would, instead of using the very terms that the legislature had held not to limit their power, have been most careful to guard against legislative usurpation by express and unmistakable words of prohibition. That they understood the necessity of employing such express language where the intention to exclude existed, is manifested by pl. 3, section 4, of Article VI, which provides that the decrees of the Orphans' Court shall not be removed into the Supreme Court or Circuit Court, in cases where the Orphans' Court has jurisdiction.

The motion to dismiss this appeal rests upon the unconstitutionality of legislative enactment. Its unconstitutionality must be clear and palpable.

Every intendment must be made in favor of legislative power. Learned judges have, with great unanimity, laid down a rigid rule on this subject. Chief Justice Marshall, in 6 *Cranch* 128, Chief Justice Parsons, in 5 *Mass.* 534, Chief Justice Tilghman, in 3 *S. & R.* 72, Chief Justice Shaw, in 13 *Pick.* 61, and Chief Justice Savage, in 1 *Cowen* 564, have, with one voice, declared that "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

No express exclusion of the legislative power can be shown ;

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is claimed to exist only under the words "as heretofore;" and if any reasonable construction can be put upon those words, which will avoid conflict between the legislative and judicial branches of the government, it is our duty to adopt it. It is not difficult to suggest such construction.

The act in question is a reasonable one; it enlarges the right of the citizen; it brings the practice in the Prerogative Court into harmony with that of every other court in the state, and removes what has always been regarded as an anomalous feature in our judicial system.

The words "as heretofore," are used either to express the location of power, or else are jurisdictional. In the former sense, they mean that as there had been a court of last resort theretofore, so the Court of Errors and Appeals should continue to be the court of last resort in all causes, and that the legislature should not establish any court of higher power. It is doubtful for which of the two purposes they were used, but the latter seems to be the more reasonable construction. Admitting that the true reading of the clause is, "in all causes with the same power as heretofore," what would be its effect upon the solution of this question?

Just here occurs the radical error in the argument against the validity of the act of 1869, resulting from a misconception of the rules of construction which must be applied to this case. The rule which governs in testing the constitutionality of acts of the national legislature cannot apply here. When we look to the constitutionality of an act of congress, it must be shown to be within the powers enumerated in the Federal Constitution; in other words, authority for it must be shown. But we have engrafted upon our state legislative system the doctrine of supremacy which belongs to the English Parliament, and when we ask the state legislature for their power to pass a given law, they reply, our power is supreme, except in so far as you can show a limitation of it in the Federal or State Constitution.

Applying this rule, the effect of the words, "with the same powers as heretofore," would be to establish a court of

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last resort with powers which cannot be taken away. This expresses very clearly that it was the intention of the framers of the Constitution to put it beyond legislation to diminish these powers. But where is the language which says that this court shall never have an enlargement of its jurisdiction? It shall have the powers specified, and remain inviolate as to those, and in securing that end, these words, "as heretofore," have spent their force.

When the Constitution asserts that this court shall have the same jurisdiction as heretofore, we are led to inquire what power it had under the old Constitution. The history of legislation, in connection with the history of this court, shows that the legislature from time to time enlarged the powers of this court, but never in a single instance claimed to reduce it, and thus it indubitably appears, that under the old Constitution, this court had such jurisdiction as it had prior to 1776, and such power as legislation conferred upon it. It seems difficult to escape the conclusion that the words "as heretofore," in the new Constitution, were no more words of exclusion than they were under the old Constitution, and that they were intended to define, not absolutely to limit the powers of this court, and to secure them against diminution, leaving to the law maker the right to augment its jurisdiction as a Court of Appeals in the last resort. This view is supported by the last clause of pl. 1, Article X, of the Constitution of 1844, which provides that "the several courts of law and equity, except as herein otherwise provided, shall continue with the like powers and jurisdiction as if this Constitution had not been adopted," clearly indicating the right of this court to have its powers amplified to the same extent that it could have been done under the old Constitution.

If an attempt had been made to establish a court with inflexible jurisdiction, different language would have been used; so vital a matter would not have been left to doubtful and uncertain inference. No one can read the Constitution without being impressed with the fact, that its framers carefully avoided a strict definition of the powers of the courts; and if they had not done so, it would necessarily and inevi-

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tably have led to much difficulty, and have left many cases which could not then have been foreseen, without adequate remedy. It certainly cannot be said that the words "as heretofore," clearly and beyond any reasonable doubt, were used to limit the jurisdiction of this court within a sphere beyond which it cannot be extended, and if no other argument could be addressed to us, than that it is a matter of doubt, that alone should be sufficient to prevent judicial interference with legislative action.

There are but two reported cases in this state which bear directly on the question under discussion. The first is *Anthony v. Anthony*, 1 *Halst. Ch.* 627; in which an appeal taken by virtue of the 7th section of the act concerning dower, passed February 24th, 1820, (*Elmer's Dig.* 145), from the final decree of the Ordinary, approving and confirming the report of commissioners assigning dower to Elizabeth Anthony, was dismissed. No opinion in this case is reported, nor is the ground upon which the dismissal rested, stated by the court. The history of the case shows that the appeal had been taken in 1843, and was dismissed in 1846. It was argued *ex parte*, and the court dismissed it for want of jurisdiction, without giving us the reasons which led to that result. A want of jurisdiction in that case might have rested upon a reason that would not apply here. A special power was given to the Ordinary in relation to dower; the same power might have been conferred upon a master in chancery, or a commissioner, and it is questionable whether the right to supervise persons exercising a special statutory authority, which, under our judicial system, inheres in the Supreme Court, could be taken away by legislative act. If it could in one case, it might in every case, and thus one of the very highest and most important functions of the court would be endangered, if not destroyed. But if this view was not taken in that case, it is highly improbable that the court after full argument would have admitted a want of jurisdiction, when for so many years their right to hear appeals from chancery rested on no better foundation. There

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is, therefore, nothing in this case which should prevent the members of this court from yielding to their own judgment in so grave a question after deliberate argument and full consideration.

The other case referred to is *Hillyer v. Schenck*, 2 *Metc. Carter* 501; to which it is a sufficient answer to say, that at that time there had been no legislative action authorizing an appeal to be taken.

The legislature, under the old Constitution, in passing the acts of 1799 and 1820 respecting appeals from chancery, and the supplement of February 24th, 1820, to the act concerning dower, and under the new Constitution in passing the act of February 26th, 1858, giving a review by this court of proceedings in criminal cases by writ of error directed to the Oyer and Terminer, have construed the Constitution liberally, and have not treated the words "as heretofore," as words of strict limitation. A like liberality has been manifested by the Supreme Court, and the court of last resort, in 2 *Southard* 861, 2 *Green* 223, 7 *Halst.* 368, and other cases readily referred to, in reviewing cases which had never arisen prior to the formation of the first Constitution.

It was intimated that no argument can be drawn from legislation under the first Constitution, because then the legislature, like the English Parliament, was supreme, and had a right to pass the act of 1799, even against an express interdiction. This is an entire misapprehension of the character of the first Constitution, as must be apparent from our judicial history, showing that the constitutionality of legislative acts passed in review before the courts. In the very case cited of *Anthony v. Anthony*, the question of constitutionality was raised. Certainly Mr. Griffith would not, in his *Law Register*, have so earnestly insisted upon the unconstitutionality of the act of 1799, unless it was well understood in his day that the legislative will must act within certain prescribed limits.

There is another fact in the history of legislation on this

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subject, which has a very important bearing on this case. By an act passed December 2d, 1794 (*Pat. Laws* 143), the Court of Chancery for the first time was invested with jurisdiction over alimony, marriage, and divorce, subjects until then within the jurisdiction of the ecclesiastical courts. The passing of these matters from the ecclesiastical courts to chancery, subjected them to review in the court of last resort, where, before that, they could not have gone. The power of the legislature to pass the act of 1794 has never been questioned, and it must be admitted that if a portion of the causes of ecclesiastical jurisdiction can be brought by the law making power within the reach of this court, the right of appeal can be extended to all cases.

It is also a noticeable fact that the new Constitution takes away from the Supreme Court the power to review by certiorari the proceedings of the Orphans' Court, in cases where the Orphans' Court has jurisdiction, and has enlarged the power of the Prerogative Court by giving to it that right of review. It should require clear language to lead to the conclusion that it was intended in these cases to prohibit the legislature from giving an appeal to the court of last resort, such right having existed under the old Constitution.

It is very difficult to conceive of any reason which could have influenced the framers of our Constitution to put it beyond the power of the law maker to give an appeal from the decree of the Prerogative Court. It was not, as will hereafter appear, because an appeal from the Prerogative Court to the judges of the common law courts was unknown to the judicial system from which our own was borrowed. It was not for the reason that the decrees of the Ordinary were invested with peculiar sanctity, for the Chancellor, from whom an appeal was given, was made Ordinary; and it could not have been from any want of confidence in the court of last resort, because matters of the highest concern in all the other courts were placed within their review.

There is, therefore, nothing in the language of the Constitution itself, or in the interpretation it has received, either

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in the course of legislation or judicial consideration, which impels this court to arrest the operation of the act of 1869.

It may be urged that while the legislature has power to extend the jurisdiction of this court, it has no right to abridge the powers of the Prerogative Court, and that one of the essential powers of that court is the finality of its decrees. If, under the English system, finality had been a feature of the Prerogative Court, the argument would have great force; but in view of the fact that the Prerogative Court in England is subject to appellate jurisdiction, no possible difficulty can be suggested in the way of subjecting its decrees to appeal here, which would not have applied with equal force to decrees in chancery, for both courts were adopted in this state without the right of appeal.

It was warmly urged upon the argument that although there is an appeal in England from one ecclesiastical court to another, such a thing was never heard of as an appeal from an ecclesiastical court to common law judges, and that the framers of our Constitution could never have contemplated any such thing. This argument rests upon an erroneous statement.

By the statute of 24 *Henry VIII*, ch. 12, sec. 8, any cause commenced before the archbishop was to be definitely determined by him without any appeal, and by the 6th section of the same act, appeals to the archbishop were to be "definitely and finally ordered, decreed, and adjudged by him, according to justice, without any other appellation or provocation to any other person or persons, court or courts." But by a later statute, 25 *Henry VIII*, ch. 19, after prohibiting appeals to the Pope, it was enacted by section 4, that "for lack of justice at or in any of the courts of the archbishops of this realm, or in any of the king's dominions, it shall be lawful to the parties grieved to appeal to the king's majesty in the King's Court of Chancery; and that upon every such appeal a commission shall be directed under the great seal to such persons as shall be named by the King's Highness, his heirs or successors, like as in cases of appeal

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From the Admiral's Court, to hear and definitely determine such appeals, and the causes concerning the same, &c." These commissioners were called delegates, and the king might appoint whom he pleased as delegates; he might appoint the whole commission if he chose, from the judges of the common law. *Com. Dig., Prerogative, (D. 14)*. And in the exercise of its discretion, the Court of Chancery would either grant a full commission of delegates, that is to lords spiritual and temporal, judges of the common law and civilians, or one to judges and civilians only. When the jurisdiction of bishops was in controversy, or a question depending that concerned the canon and ecclesiastical law, a full commission was granted. When it was altogether a matter of law, as a question on a will, a commission issued to judges and civilians only. 1 *Williams on Ex'rs* 446, *note (p.)*. And this was declared to be the practice by Lord Hardwicke in *Ex parte Hellier*, 3 *Atk.* 798.

The Prerogative Court in this state owes the finality of its decrees, neither to its peculiar organism, nor to constitutional provision, but wholly to legislative enactment, (*Rev. Laws* 776); and there is therefore nothing in that attribute of the court which inhibits legislative interference.

But if such appeal had not been entertained in England, the answer is obvious. If those ecclesiastical courts which had appellate jurisdiction had been adopted into our judicial system, and continued under the new Constitution, the argument would have great weight. But the fact that the power of the Ordinary and the Prerogative Court, which existed separately under the English system, have been blended here, and no ecclesiastical court of appellate jurisdiction provided, repels the presumption which otherwise might have arisen, and points strongly to the opposite inference. With equal force it might be argued that the legislative acts which give to the Ordinary powers unknown to the ecclesiastical courts, such as the act concerning drunkards, and others of like character, are void, because the framers of the Constitution could never have intended that the Ordinary

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should possess functions which the ecclesiastical courts never exercised in England.

There is no difficulty suggested by pl. 5, section 2 of Article IV, in reference to the question whether the Chancellor could sit on the hearing of this appeal, for that clause clearly excludes him in every case of appeal, from sitting or having a voice in the hearing or final decree.

The motion to dismiss the appeal must, for the reasons expressed, be denied.

THE CHANCELLOR, dissenting.

The question here is, whether the act of 1869, granting an appeal from the Prerogative Court, is constitutional. Courts will not declare an act of the legislature unconstitutional, unless it is shown to be so, clearly and free from all reasonable or serious doubt. It is not necessary that it should be expressly prohibited by positive words in the Constitution. Most of the cases in which acts have been declared void, as prohibited by the Federal or State Constitutions, are those in which they were held to be contrary to the intent and object declared, by a fair construction of the instrument. The legislature seldom or never intends to violate the Constitution, and therefore few cases can arise in which their action is prohibited by its express words.

But, beyond this requirement that the case should be free from reasonable doubt, courts should have no leaning or intendment either way. The Constitution is the act of the people of the state. They adopt it directly; it is almost the only act in the formation or conduct of the government that they directly perform. By it they determine how much of their natural rights they are willing to surrender, and how much power over themselves they are willing to place in others, to form an efficient government. In proportion to the rights reserved the nation is free; if all are surrendered the government is despotic; and this, whether the power is delegated to one, or to a number. The judiciary is the

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branch of government to whom it is entrusted to determine whether the legislative branch has exceeded the powers delegated to it. And there is no reason why it should side with despotism against freedom, with usurpation against the plain reservation of rights and powers to the people themselves, or why it should combine or conspire with a co-ordinate branch for that purpose, when it is the only guard or balance wheel by which such excess can be kept in check.

In this case, the people of New Jersey have retained the creation and change of the six principal courts to themselves. It is a power not necessary to make the legislature an efficient government, but can be exercised by the people conveniently. It needs no haste; and it is perhaps better that such change cannot be made to suit the emergency of every cause that may arise. Beyond the requirement that the unconstitutionality should plainly appear, there ought to be no leaning or intendment.

There are here two questions: First, whether the Constitution directly authorizes an appeal from the Prerogative Court to the Court of Appeals. If it does, the act of 1869 is valid. But if the Constitution does not authorize it, as there is no prohibition against conferring additional power on any court, unless so far as the powers of the other courts are infringed on, the second question will arise, whether this act infringes on the powers of the Prerogative Court.

The Constitution divides the powers of government into three distinct departments, the legislative, judicial, and executive. It then declares that: "The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes, *as heretofore*; a court for the trial of Impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court; Circuit Courts; and such inferior courts as now exist, and as may be hereafter ordained and established by law; which *inferior courts* the legislature may alter and abolish as the public good may require."

Before that Constitution, the Court of Appeals had never been authorized to hear appeals from the Prerogative Court,

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and if the words "as heretofore," are to be considered as applying to the jurisdiction, or as qualifying the words "all causes," to which they are joined, then it is conceded that this court was not by the Constitution empowered to entertain appeals from the Prerogative Court. This is the natural and proper application of these words, as they stand in this sentence; they qualify the extent or universality of the words "all causes," and limit them to such causes as were before subject to appeal. These words cannot be rejected because they contradict or limit the preceding words, any more than the words "of full age," after the words "every white male citizen," in the suffrage clause. In a fair and natural construction, such phrase at the end of a sentence may be applied to the whole sentence as well as to the last words; such construction might, with propriety, be given in the parallel clause in the old Constitution, were it not that it would make the clause untrue. The court had never before been one of the *last resort*; it had always been subject to an appeal to the king in council. But here such application is impossible; it was not intended, as such reading would imply, to vest the whole judicial power in this court, nor was it so vested "theretofore." It could not be applied either to the name or constitution of the court, for both were essentially changed, and were not "as theretofore." It could not be transposed so as to come after the words 'last resort'; in part, because it would make the clause assert that the court was of the last resort before then in all cases, which is not true; in part, because this construction is based upon the claim, that this phrase was copied from the old Constitution, and must have the same application as there, to the words "in the last resort," yet under the Constitution it never was a court of the last resort, but an appeal from it always existed to the king in council, reserved in Lord Cornbury's instructions, (*L. & S.* 641); but mainly because such arbitrary transposition of words for the purpose of giving a desired meaning, is never allowed in any system of interpretation.

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Transposition of words has been allowed, but only in cases where the intention plainly expressed in other parts of the instrument, requires it to confirm that intention, and then not in such manner as to destroy the plain meaning of any sentence; and it is a mode of interpretation always of doubtful propriety. In the constitutional provision "that bills for revenue shall originate in the Assembly, but the Senate may propose amendments," it would never be allowed for any purpose to transpose the words "Senate and Assembly," so as to reverse their powers. The promise of the Saviour to the penitent thief, "I say unto thee this day thou shalt be with me in Paradise," may have its meaning changed both as it stands in the original, and in the translation, by a change of punctuation which is admissible, as that is the work of translators or printers. But if had been written "thou shalt be this day with me in paradise," a transposition so as to read, "I this day say unto thee," could never have been ventured on even by Pope or Ecumenical Council, although necessary to sustain the whole realm of purgatory. Any transposition in this case seems equally unwarrantable.

But if it was a case in which transposition was admissible, there is nothing to require it. The other provisions of the instrument show, on the contrary, that this clause was intended to operate as it reads, and thus alone will be in harmony with its other provisions; the last sentence of the first paragraph of the 10th Article, directs that these courts should continue, except as therein otherwise provided, with their former powers and jurisdiction. This indicates a general intention that the powers should remain unaltered. The special provision for writs of error from the circuits to this court would be entirely unnecessary, if the words creating this court gave it appellate jurisdiction over all courts, and clearly shows that the only jurisdiction understood to be conferred on this court was in such causes as it before had jurisdiction to hear. The provisions of pl. 5 and 6, in section 2 of Article VI, also show that such was their understanding.

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The situation and past history of the Prerogative Court renders it probable that that body of lawyers of learning and eminence, the elite of the bar of the state, who formed so large a part of that convention, and were, without doubt, both active and influential in adjusting the arrangement of the courts, meant by this clause what is expressed in it. In England, the proof of wills and granting of administrations, and the business connected with them, and in fact almost all matters now within the jurisdiction of our Prerogative Court, had been, for centuries, entrusted to the ecclesiastical courts. When England separated from the See of Rome, this jurisdiction, by the statute of 23 *Henry VIII*, was declared to be in the bishop, or ordinary of the diocese, and in cases of goods within two dioceses, in the archbishop. The bishops exercised this jurisdiction by an official, called his Chancellor, and sometimes called the Ordinary; the archbishop, by an official called the judge of the Prerogative Court, a name derived from the fact that jurisdiction in such cases was by the archbishop's prerogative. An appeal was allowed from the Ordinary to the Prerogative Court, whose sentence was without appeal. But a statute of the next year, 24 *Henry VIII*, ch. 12, gave an appeal to the king in chancery, which was heard before delegates appointed under the great seal, who were called the Court of Delegates. Some of these, as well as the officials of the bishop and archbishop, were always doctors of the civil law. No appeal ever was given to the law courts, either to the Exchequer Chamber or the House of Lords. Under the proprietary government, their governor entertained the testamentary jurisdiction. This appears by the records in the office of the Secretary of State. Upon the surrender in 1702, the Queen, in the commission to Lord Cornbury, (*L. & S.* 651) gave him full power to erect and establish courts, but in his instructions (*L. & S.* 639) subjected the colony to the ecclesiastical jurisdiction of the Bishop of London, except the collating to benefices, granting licenses for marriages, and the probate of wills, which was reserved to

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the governor for the time being. Until the Revolution, this power continued in and was exercised by the governor. And although the instructions to Cornbury, (*L. & S.* 641), created him and his council the Court of Appeals, no appeal was ever given from the governor's testamentary proceedings, except the appeal which existed from all the highest colonial courts to the king in council. At the Revolution, the Constitution of 1776 declared the governor to be Ordinary and Surrogate-General, and declared that he and the council should be the Court of Appeals in the last resort in all causes of law, "as heretofore." This had never been construed to give appeals from the Ordinary, and the legislature had never provided for taking such appeals. Until then, either in England or this country, no appeal had ever been given, or been had from the Prerogative or Testamentary Courts to the Courts of Appeal in cases of law or equity. And it is not probable that this body of experienced and conservative lawyers intended to introduce such innovation; and if they did so intend, it is hardly conceivable that they would have attempted it without expressing it in words that were prominent, and could not be mistaken, especially that they would do it by words seeming to say that no innovation was intended. Above all, they would not have used the very words that had created the doubt under the old Constitution, and have changed the sentence so as to increase that doubt. They must have known of the doubt and controversy stated in 4 *Griff. Reg.* 1179; that book was in the hands of all.

What the convention intended, if it was not expressed, should never be allowed to control the meaning of the words they have used; but when it is claimed that they intended something different from what is expressed, facts which show that their intention could not have been other than that expressed, are a full answer to the claim.

If this construction is correct, the Constitution did not give this appeal. But as the legislature may confer additional powers on any constitutional court, the act of 1869 is

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valid, unless it infringes on the power of the Prerogative Court.

The first section of the 10th Article provides, that "the several courts of law and equity, except as herein otherwise provided, shall continue with the *like powers* and jurisdiction, as if this Constitution had not been adopted." These words are not to be construed in a strict technical sense, as if it read courts of common law, but must include all courts which administer either testamentary or common law. This but affirms positively the plain implication to be derived from the other provisions regarding the courts named as the judicial power of the state, that the legislature cannot interfere with their existence or diminish their power. The special provision that certain equity powers may be conferred on circuit courts for foreclosure, is another confirmation.

The only question then is, does subjecting the Prerogative Court to an appeal, detract from or diminish its powers? It makes it at once an *inferior court*; it subjects it to the Court of Appeals, and takes from it the power of making a final decision in any case. The power of determining all causes, or a certain class of causes, without appeal, is the very summit of judicial power. It is the same question, as whether it would detract from the power of a legislature before uncontrollable, to place over it an absolute veto, or whether it diminishes the power of a sovereign, to give a parliament power to reject his edicts. To state the question is to answer it. The convention deemed it necessary to provide for writs of error from circuits, and to prohibit writs of certiorari to Orphans' Courts, and therefore must have considered the right of appeal as one of those fixed by the Constitution.

By the same reasoning that would sustain this law, the Supreme Court or the Court of Chancery, may be made subject to an appeal to the circuit, or one of them to the other.

But this whole question has been before decided in this court, and is *res adjudicata*. In the case of *Anthony v. Anthony*, 1 Halst. Ch. 627, a direct deliberate decision was

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made on this very point. It was an appeal from the Prerogative Court to this court, on a matter of dower; the 7th section of the act of 1820, had given such appeal from the Orphans' Court. That act was still in force; it was repealed by the act of April 16th, 1846, and is No. 149 in the repealing section, (*Rev. Stat.* 683), which did not take effect until February 1st, 1847. This cause was decided in April Term, 1846; the old Constitution was abolished, and the new one in force. Neither provided for such appeal; it was made in 1843, under the old Constitution. That was not so stringent against it as the new. The Prerogative Court was not positively protected by it as in the new. The dismissal, as appears by the report and by the rule granted to show cause, was on the ground of jurisdiction. The records show that there was no want of prosecution, or other reason for dismissal. The note to the case, whether by Chancellor Halsted or the reporter, shows that such was understood to be the ground of the decision, for it ingeniously suggests a case which might be beyond the reason for such decision.

Of the twelve judges who heard the cause, six were members of the constitutional convention held within two years. All the court concurred in the dismissal, except Chancellor Halsted, who declined to vote. The appeal had been taken by a prominent member of the convention, one who would not have deserted his client if he thought the appeal sustainable, any more than he would have endeavored to sustain it if he thought it clearly unconstitutional; he did not resist the application. The motion was made by another prominent member of the convention, who based it on the want of jurisdiction, and contended that under the new Constitution his case was stronger than under the old. Both counsel had just risen from their labors as revisers of the whole statute law, and one week before this the legislature had passed the dower act of 1820, with the appeal section stricken out by the commission, and it cannot be doubted, stricken out because they thought it unconstitutional.

In the case of *Hillyer v. Schenck*, 2 *McCarter* 501, a

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similar appeal was dismissed by this court for want of jurisdiction. And I think, taking the whole case together, that the inference is fair, that the want of jurisdiction was based on the want of constitutional power.

If there is authority in judicial decision, these should bind this court on this question. The first was made near the time of the adoption of the Constitution, and by men who were concerned in framing it. And if there is any force in the maxim *contemporanea expositio fortissima est*, it should be regarded here.

The revisers finished their work without provision for such appeals. One part of their duty was to adapt the statute law to the new Constitution. If that gave this appeal, the omission was as gross, though not so mischievous, as to have left the writ of habeas corpus of no avail for want of provision by whom and when it should be granted. Twenty-four successive legislatures have been guilty of the same neglect. Except in a plain case, we should not arrive at a conclusion involving such results, even to perform the pleasant duty of a good judge, *ampliare jurisdictionem*.

The appeal from chancery granted under the old Constitution, may be explained by the fact that this Constitution was not viewed as restricting the legislature. It expressly vested in the legislature, not the legislative power, but the "government of the province." That of course included the power of making or changing a Constitution. And the provision which it contained, that each legislator should take an oath not to assent to any law which would annul or repeal three specified sections, implies both power and permission to repeal at pleasure, all other sections. Under this view, the legislature changed entirely the elective franchise, and the very style and name of the government, and many other provisions. Had the Constitution been unalterable, it did not create the Court of Chancery, or recognize its existence at all, much less in such way that the legislature had not power to abolish it, or change its jurisdiction, by adding or taking away. The Prerogative Court was in the same

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situation. These courts, and in fact any court except the Court of Appeals, were not established or continued by the Constitution of 1776. The provision that the common law and statutes then in force should continue in force, did not continue them. Their existence did not depend on statutes, but the ordinances of the royal governors, which fell with the Revolution. It was found necessary to supply this defect by the act of October 2d, 1776, (*Pat. Rev.* 38). These courts, whose existence depended on that statute, could of course be changed or abolished by like legislation. This power the legislature freely exercised. The Constitution of 1844 has changed this ; it was intended to change it.

So far as the question under consideration is concerned, I am gratified at the result to which the majority have arrived, although I cannot concur in it. The subject matters of the jurisdiction of the Prerogative Court are too important to be submitted to any single judge, without appeal. It is an anomaly in our jurisprudence, and with the elements of both courts as now constituted, there remains nothing of the reason that once existed, for not giving the appeal to the appellate courts in law and equity cases.

The question being whether the appeal should be dismissed, the vote was as follows :

For dismissal—ZABRISKIE, C., VAIL. 2.

Contra—BEASLEY, C. J., BEDLE, CLEMENT, DEPUE, KENNEDY, OGDEN, OLDEN, SCUDDER, VAN SYCKEL, WALES. 10.

National Bank of the Metropolis v. Sprague.

THE NATIONAL BANK OF THE METROPOLIS vs. SPRAGUE
and others.

1. A motion to dismiss because an appeal does not lie, requires notice.
2. An order refusing to set aside a sale, upon an application based on the illegality of the sale, is appealable; it is not a discretionary order.
3. Where a sale is unfair and illegal, and the property, if fairly sold, would have brought enough to pay a lien creditor, he is aggrieved by an order refusing to set aside the sale, and is a proper party to appeal.
4. Courts of equity interfere upon a proper application, to set aside sales made by their officers when conducted contrary to principles of law, or when, through fraud or mistake, injustice has been done. They so interfere upon application in the suit in which the sale was made, and even when the purchaser was not a party to the suit. By becoming a purchaser, he subjects himself to the jurisdiction of the court.

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This was a motion to dismiss an appeal from an order of the Chancellor refusing to set aside the sale made by the master, of land and personal property, under the execution and order in the cause. The order was upon an application of the appellants, who were the complainants in chancery. The motion to dismiss was on the ground that the order appealed from was on a matter of practice and within the discretion of the Chancellor.

The motion was first made on the first day of the term, without notice of it to the appellants. It was opposed by the appellants, on the ground that notice was necessary of a motion to dismiss because an appeal did not lie. The court unanimously held that notice in such case was necessary. The motion was afterwards renewed upon notice.

Mr. Frelinghuysen, in support of the motion.

Mr. McCarter, contra.

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The opinion of the court was delivered by

THE CHANCELLOR.

The complainant in this case applied to the Chancellor to set aside the sale of the real and personal property made by the master. An order was granted on Kirkpatrick, the purchaser, to show cause why the sale should not be set aside. The grounds alleged were, that the master had refused the bids of proper persons at the sale; that he made requirements of some bidders not exacted of others; that he put up for sale and sold in one parcel the entire furniture of a hotel worth \$50,000; that he sold it without exhibiting it to purchasers, and when out of their view, and on terms as to removal that prevented any one, except the actual purchaser, from bidding; and that the purchase was made by Kirkpatrick for persons in fact parties to the suit, with different interests, who unlawfully combined to prevent competition, and procured Kirkpatrick to purchase for them. The Chancellor refused the application on the ground as expressed in his opinion, that the objections were not sustained.

The statute provides that "all persons aggrieved by any order or decree of the Court of Chancery, may appeal from the same or any part thereof." If this order was unlawfully made, the appellants were aggrieved by it. They are creditors who had a lien on the property sold. The price of \$135,000, for which the master sold the property, will be insufficient to pay their whole claim, or perhaps any part of it, after satisfying the prior encumbrances. If the sale, as they allege, was unfair and illegal, and the property, if fairly sold, would have brought enough to pay them, they are a proper party to appeal.

But the respondents allege that this is not a proper subject of appeal; that the application was one in the discretion of the Chancellor, and not for relief to which the appellants had any right.

It is settled, and is not in fact disputed, that an appeal

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will not lie from an order in the discretion of the Chancellor, or upon a mere matter of practice. It was so ruled by this court in the matter of the application of *Anderson, guardian of Thompson*, 2 C. E. Green 536.

The real question is, whether the order applied for was in the discretion of the Chancellor, or whether it was a matter of right which he was bound to grant upon a proper case shown. What is matter of discretion may, in some cases, be doubtful. In *The People v. The Superior Court of New York*, 5 Wend. 125, this discretion is correctly defined to be "that which is not and cannot be governed by any fixed principles or rules." And in *Rogers v. Hosack's Ex'rs*, 18 Wend. 319, Justice Cowen says, that to warrant an appeal, "some definite rule of law or equity must appear to have been violated." This is cited with approbation in the opinion of this court, delivered by the Chief Justice in *Garrett v. Hill*, 1 Halst. Ch. 641.

Courts of equity interfere upon a proper application, to set aside sales made by their officers, when conducted contrary to principles of law, or when, through fraud or mistake, injustice has been done by the sale. They so interfere upon application in the suit in which the sale was made, and even when the purchaser was not a party to the suit. They hold that by becoming a purchaser in the suit, he subjects himself to the jurisdiction of the court, so far as the purchase is concerned.

In England, and also in the Court of Chancery that formerly existed in New York, confirmation of sales in chancery was required. But the jurisdiction did not depend upon that; sales were set aside upon application in the suit, even after confirmation.

In *Casamajor v. Strode*, 1 Sim. & Stu. 381, it was held that a stranger to the suit, by becoming a purchaser, submitted himself to the jurisdiction of the court. In *Watson v. Birch*, 2 Ves., jun., 51, the sale was opened after confirmation. And in *Morice v. The Bishop of Durham*, 11 Ves. 57, and in *White v. Wilson*, 14 Ves. 151, Lord Eldon

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held that after confirmation sales could not be opened except for fraud, or fraudulent negligence, implying that in such case they would be opened.

In *Collier v. Whipple*, 13 *Wend.* 224, and *Tripp v. Cook*, 26 *Wend.* 143, the sales had been confirmed and the deeds delivered, yet the sales were set aside. In *Requa v. Rea*, 2 *Paige* 339, a sale to a stranger was set aside on petition in the suit after the deed was delivered.

In this state, in *Scaman v. Riggins*, 1 *Green's Ch.* 214, Chancellor Pennington set aside a sale, as he said he had no doubt of the power of the court, or *its duty*, to set it aside. In *Howell v. Hester*, 3 *Green's Ch.* 266, the same Chancellor declared that the case was within the *principle* of the authorities, and set aside the sale upon petition. In *Campbell v. Gardner*, 3 *Stockt.* 423, Chancellor Williamson, upon petition in a foreclosure suit, set aside a sale after the deed had been delivered. In that case the complainant was the purchaser, and the relief was granted on grounds perhaps in the discretion of the court, but in the others it was on the ground of fraud or mistake, or other grounds which gave title to relief in chancery on bill filed. The relief was granted not as a matter of discretion, but as a matter of *principle* and *duty* or right.

In this case, some of the grounds on which the application was made would, if sustained, give the appellants a right to have the sale set aside. They would have had that right upon bill, on the ground of an unlawful combination to prevent competition. If it is the settled practice of the Court of Chancery to grant such relief upon petition in the suit in which the sale is made, and the established doctrine there, that it is the duty of the court to grant it in a case within the principles fixed for such relief on bill, then it is clearly no longer a matter of discretion.

That court might once have had a discretion, whether it would permit the relief to be asked on petition, or would require a bill to be filed, but the practice by petition being established, the Chancellor, when he hears and examines into

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the merits of the application, has no discretion in the decision, but must determine according to the settled rules of law and equity. This result, of course, would not follow in an application not based upon the illegality of the sale, but upon matters on which it is in the discretion of the court to give relief or not.

On principle, then, an appeal should lie from a decision like this, determining the merits of the controversy between the appellants and the purchaser. That controversy is, whether the sale was made contrary to the requirements of law.

And this appeal is sustained by authority as well as principle. It has been expressly decided that an appeal will lie from an order upon application to set aside sales, made by petition or motion in the suit in which the sale was ordered. It was so held in England by the House of Lords, in *Baile v. Maule*, reported in a note, in 7 *Cl. & Fin.* 121, and referred to in *O'Neill v. Fitzgerald*, in 3 *Bligh's Appeals* 24. And in New York such appeals were sustained in *Collier v. Whipple*, 13 *Wend.* 224, and in *Tripp v. Cook*, 26 *Wend.* 143. In the last case, which came up like the one before us, the appeal was sustained on a motion to dismiss it. In *Kingsland v. Bartlett*, 28 *Barb.* 480, an appeal from an order of the special term refusing to set aside a sale was dismissed, because the application was not founded on any fraud or irregularity in the proceedings, but on a misapprehension as to the time of sale, and such application was held to be in the discretion of the court. The court say, there can be no *right* where no legal mistake has been committed by those who have conducted the proceedings. This is in accordance with the principles in the other cases.

The motion to dismiss must be denied.

The whole court concurred.

Raritan Water Power Co. v. Veghte.

THE RARITAN WATER POWER COMPANY, appellants, and
VEGHTE and others, respondents.

1. The right to divert water is an incorporeal hereditament, and at the common law, could only be created by deed. But when a charter of a water power company gives a right to divert the water of a river, upon the *written consent or permission* of those owning lands and water privileges, such written consent obtained after the act, with the assistance of the act, operates as a substitute for the common law method, and has the effect of granting to the company a legal right to divert.

2. If such consent was in fact, however, obtained previous to the grant of the charter, it was a license merely. But when such license has been executed upon the lands of the licensor, and permanent works and improvements erected in pursuance thereof, at great expense, equity will not, to the extent that the license is executed, disturb it, or permit its revocation.

3. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right cognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon proper bill filed, enjoin the licensor from accomplishing his fraud, when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee.

4. The measure of the execution of the license, in this case, is the capacity of the dam and canal as originally constructed, regarding the culverts only as a means of supply, according to the necessity of business, and liable to any change in their location or construction, the better to enjoy the benefit of the dam and canal as originally built and completed, the equity being that the defendants shall, if necessary, have the full use of the expenditure made on the faith of the consent within its terms, and depending upon it.

5. An equitable estoppel will affect a subsequent purchaser to the same extent as his grantor, when he has had actual notice of the condition of things upon which it is based, or when the circumstances are such as to put him upon inquiry to ascertain the facts.

6. To constitute an abandonment, the facts or circumstances must clearly indicate such an intention. Abandonment is a question of intention. Non-user is a fact in determining it, but though continued for twenty years, is not conclusive evidence, in itself, of an abandonment. Its weight must always depend upon the intention to be drawn from its duration, character and accompanying circumstances.

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The opinion of the Chancellor is reported in 4 *C. E. Green* 142.

Mr. Williamson and *Mr. J. Wilson*, for appellants.

Mr. Dodd and *Mr. Bradley*, for respondents.

The opinion of the court was delivered by

BEDLE, J.

The appellants are the owners of a dam and water power on the Raritan river, at Raritan, in Somerset county. The same formerly belonged to the Somerville Water Power Company, a corporation incorporated February 28th, 1840. The latter company mortgaged their whole property and franchises in 1848, to secure certain bondholders, which mortgage was afterwards foreclosed by them in the United States Circuit Court, and the whole property, franchises, &c., purchased by the bondholders; which bondholders afterwards (March 25th, 1864,) conveyed the same to the appellants, they having been incorporated as the Raritan Water Power Company, March 24th, 1863, and fully authorized to purchase, possess, and enjoy, all the real estate of the Somerville Water Power Company, including the canal, head gates, water power, water rights, franchises, &c. The Raritan Water Power Company are now the owners of all such property, rights, and franchises, as were owned by the Somerville Company.

The bill was filed against the Raritan Company, by seven different owners of land along the river, two of whom are above the dam, one at the dam on each side, and the other four are below the dam. The bill complains that the company had raised their dam, and were about to tighten and further raise it; also, that they were about to change the location of the head gates of their canal, and to enlarge their size, and by these acts to increase the quantity, and to divert more water than they are entitled to. The water power consists of a dam across the river, and a canal about

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three miles in length, on which are erected some mills and factories, and which are supplied with water by means of said canal. The owners above the dam could be affected only by an increase of water, if the dam was too high, while those below would, by the increased height of the dam and the size of the gates, be affected only in the diminution of water in the river through their lands. The decree determines that the Raritan Company are entitled to maintain, make perfectly tight, and keep in repair their dam, at such height as to raise the water of the river at the place of the dam, two and a half feet at its ordinary level prior to the erection of the dam; and the Chancellor not being satisfied that they had raised, or intended to raise the same to any greater height, the bill was dismissed as to two of the complainants, Wever and John Veghte, they being owners above the dam. And as to the owners below the dam, *viz.* Rynear H. Veghte, Hope, Stryker, Frelinghuysen, and Crater, (said Crater being an owner both below and above the dam) it was decreed that the defendants, their successors and assigns, be perpetually enjoined and restrained from increasing the capacity of their raceway and trunks, from diverting water from said river, beyond the capacity of their works for that purpose as constructed in or about the year 1843, by any hydraulic means or devices, or by changing the height, capacity, or position of said trunks, or the depth or capacity of said raceway, or the level of water therein, except as the reduction of said level may be incidental to the fair use of said water in applying the same to the production of manufacturing power at the lower end of said raceway where the same is wont to be applied; and also restraining the defendants from diverting the water of said river in such manner as to prevent a sufficient quantity of water from flowing at all times in the channel of said river, below said dam, for the use of the five complainants last named, and those who may occupy their lands, for all agricultural and other useful purposes for which they have heretofore been used. The date (the year 1843) fixed in the

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decree, refers to the time when the present trunks or culverts, through which the water is communicated from the pond to the canal, were built. The defendants appealed from the whole decree, except as to the dismissal of the bill against Wever and John Veghte, and the complainants presented a cross appeal, on the ground that the defendants should have been enjoined from diverting any more water than has been diverted for and during the twenty years next preceding the filing of the bill. There is not much practical difference between the decree and the limitation by user mentioned in the cross petition, and the whole case may be disposed of on the defendants appeal, the chief question being to what extent they may divert the water of the river, as against the complainants below the dam, taking the dam at the height indicated by the Chancellor, and tightened, as in his decree mentioned.

John I. Gaston and others, who are the corporators of the Somerville Water Power Company, were associated together, previous to their incorporation, as owners of certain real estate on Raritan river, below the present dam, and including a dam and water power, known as the Dawes or Vandoren dam. The same had been erected under an act of the legislature of February 16th, 1820, and the purchase of which was afterwards made by the associates. By this water power, I believe, two grist mills and an oil mill were run. The associates being desirous of increasing their power, establishing factories, and building up a manufacturing town at the place now called Raritan, commenced, in the year 1839, the erection of the present water power, and while the same was in progress, obtained from the legislature their act of incorporation of February 28th, 1840. The preamble of this act recites the fact of ownership by the associates of their lands and water rights on the Raritan, with the right to erect and maintain the Vandoren dam, pursuant to the act of February 16th, 1820, entitled "an act to enable Jacob Vandoren to erect a mill dam across the Raritan river," and that "the said John I. Gaston and his

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associates are desirous to increase said water power, for the establishment of manufactures, by diverting the water of said river from its accustomed channel into a canal to be constructed for that purpose, and have already incurred great cost and expense in effecting that object, and have represented that the same can be effected with the voluntary consent of the owners of land through which said canal is contemplated to be cut, and also of all others whose interests may in anywise be affected by the execution of said project," &c. Under this act the Somerville Water Power Company were authorized to erect and build a dam across the river Raritan, opposite the lands of John H. Vandoren and Willet Taylor (which is the present dam), provided the voluntary consent of the owners of said lands should be first obtained, and provided also, that the said dam shall be so constructed as not to raise the water more than two and a half feet above its ordinary level, the said company to be answerable to owners of land and water privileges above said dam for damages arising from overflowing and backwater ; also to cut a main raceway or canal from the said dam to any point on the said Raritan river betwixt the present dam, commonly known as Vandoren's dam, and a point half a mile below the covered bridge crossing said river, of such dimensions and depth as said company may see proper ; and also to cut and erect as many lateral or branch raceways, locks, weirs, gates, and other works from said main raceway to the river as the said company shall deem expedient, for the purpose of creating and using the said water power for mills, manufacturing, or other purposes connected with the objects of the act ; said lands for said main and lateral raceways not to be taken without the consent and permission of the owner, and satisfaction made or agreed on for damages ; a map of location of the dam and route of the main raceway to be deposited in the Secretary of State's office ; and further, "that when the said dam and raceway shall be completed, it shall be lawful for the said company to divert the waters of the river

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Raritan, or so much thereof as may be necessary for the purposes of this act, from their natural channel into the said main raceway, and cause them to be again returned to said natural channel, in such way as the said company may deem most expedient; provided always, that it shall not be lawful for said company to make such diversion until they shall have obtained written consent and permission to do so from the owner and owners of all lands lying on said river Raritan, between said dam and the point where the said main raceway again intersects said river."

The canal was made on the north side of the river, and the following were the owners of lands on the south side, whose consent to the diversion of the water was necessary, commencing at the dam: Willet Taylor, Lawrence V. Davis, Joseph V. D. Vredenburgh, John Van Middlesworth, Garret Van Middlesworth, Peter B. Dumont, James Quick, and Catharine Veghte; all of whom are now dead, except Davis and Vredenburgh, and all of whom were alive while the dam, canal, and works were in process of construction, and until after their completion. Davis and Vredenburgh, the survivors, are not complainants in this cause, but they were witnesses, and their consent to the erection of the water power is clear. The Taylor land is now owned by the complainant, Crater; the Van Middlesworth farms by the complainant Stryker; the Dumont farm, mostly by the complainants, Frelinghuysen and Hope; the balance of the Dumont farm, and the Quick farm, by L. E. Rice, who is not a complainant, (it being very clear that Quick gave his consent); and the Catharine Veghte farm, by the complainant, Rynear H. Veghte. The defendants set up in their answer, that all the owners at the time of the erection of the water power, under whom the complainants claim, together with the others to be affected on the south side of the river, signed a written consent to the erection of the dam, and the diversion of the water. The first question then arises, was such consent signed? There is no doubt from the evidence, that in or about the year 1839 or 1840,

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there was in existence a written paper, purporting to be signed by all the owners on the south side of the river, giving such consent. The evidence is entirely clear and direct, as to the genuineness of the signatures of Taylor, Davis, Vredenburgh, Dumont, and Quick, five of the owners, and as to the other three, the Van Middlesworths, and Catharine Veghte, the facts and circumstances, though not so direct and conclusive, are sufficiently clear to conclude that their signatures were also genuine. The Chancellor so held as a matter of fact, and I have no doubt from the evidence that such was the case. It must, therefore, be taken as a fact, that a paper of the description stated, was signed by all the owners on the south side of the river, under whom the complainants derive their titles. That paper has been lost, but sufficient evidence has been produced to permit proof of its contents. The precise date of the paper is not shown, neither is it absolutely certain from the evidence before us, whether it was signed before or after the date of the charter, (February 28th, 1840). The weight of the testimony is, that it was signed before that time, and just previous to the commencement of the works. If signed after the charter, as the statutory consent, the *written* consent or permission upon which the company were authorized to divert the water, then it, in connection with the act of the legislature, would be sufficient to create the right to divert as a legal title. It is true, that such right would be an incorporeal hereditament, and could be created at the common law only by deed, it being a right not lying in livery, but in grant, yet a deed is only a mode by which it may be created, exclusive of course at the common law, but subject to statutory change. The meaning of the words "written consent or permission" in the charter, is a question of construction merely. The statute was intended to substitute for, or make equivalent to, the common law mode of conveying the right, a mode with the assistance of the act, simply by writing, not by deed. The case of *Hetfield v. The Central Railroad Company*, in this court, 5 *Dutcher* 571, does not

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conclude this result. The charter in that case made the taking of land conditioned upon the payment of damages, "unless the *consent* of the owner or owners of such lands be first had and obtained." No mode of consent was indicated. The act was general, and Justice Elmer, in his opinion, states that that provision was entirely consistent with the previously existing law, and was framed with reference to it; it was therefore held in substance, that verbal consent was not sufficient to give title to the railroad company, that it amounted only to a license, revocable at law. It is a rule, that when a statute directs anything to be done, and does not appoint any special manner, it shall be done according to the common law. *Bac. Abr.* (Bouvier's ed.) *Statutes; Saville* 59. That rule would justify the application of the common law mode of acquiring the consent mentioned in the Hetfield case; but when a *manner* is stated, written consent, it would seem to be clear that the statute was intended to make that, with the aid of the statute, a sufficient grant of the right to be enjoyed. There would appear to be no reason why that mode of consent was stated, if it was intended that the right should only be acquired by deed at the common law.

There is a significance in the use of the words, "*written consent or permission*," in the charter before us, as the basis of the right to divert. In the 8th section, the company cannot take or occupy lands for the raceways, without "*the consent and permission*" of the owners, leaving out the word *written*, and in the 7th section, the dam cannot be erected without "*the voluntary consent*" of the owners of the lands where erected. These words are general, and the rights to be acquired are corporeal, and would naturally be based upon an estate of fee simple, and the title would have to be acquired by deed, as was done by the company for the site of their dam and raceways, but concerning the incorporeal right of diverting water, the mode of acquiring it from the various owners affected by the diversion, was simply by writing, not by deed alone. If the words "*consent and*"

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permission" had only been used in the section authorizing the diversion, the case of Hetfield would apply, but a "written" consent with the aid of the statute, is equivalent to the deed at common law, to the full extent of the interest intended to be secured. The construction of this feature of the act is important, as there are various acts concerning plank, turnpike, and other roads, and dams, providing for written consents, and any other construction might seriously affect the legal rights, which I think such consents, by authority of the legislature, were intended to secure. If, then, the written consent of the owners to the diversion was obtained after the act, it, with the act, must have had the effect of granting to the company a legal right to divert to the full extent of its terms.

But as already stated, the weight of the evidence is in favor of the fact that it was obtained just previous to the commencement of the work, and on that basis it becomes necessary to inquire what effect, in connection with the erection of the works, it will have in equity. The complainants seek to enjoin the defendants from any greater diversion than has been made since 1843, when the present trunks or culverts were put in. These are two in number, three feet by four each, about thirty feet in length, and placed about fifteen inches below the average level of the water in the pond. The canal is about three miles in length, running from the pond on the north side of the river, opposite the land owners on the south side, already mentioned, and emptying through a waste-weir and a tail-race into the river below. The canal was constructed thirty feet wide at the bottom, and forty-three and a half feet at the top, with an average depth of four and a half feet, except at the lower end, where it was probably more. There are two reservoirs upon it of considerable dimensions, and a guard bank on the river side along the canal, to protect it from freshets. The present trunks or culverts were put in in place of two sluice ways, covered over with about a foot of earth, forming part of the embankment of the canal, which were a little

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more than one-half the capacity of the present trunks; the ~~we~~ were in but a short time, probably a year, and were intended ~~and~~ only for a temporary purpose, and to sufficiently supply the ~~ne~~ mills then upon the water power. After the same had been ~~seen~~ put in, other mills were erected, and to meet the additional im- ~~men~~ mediate and prospective wants, the present culverts were in- ~~in~~ serted. The sluice ways that remained about a year, were built ~~it~~ only, as appears from the evidence, for a temporary purpose ~~se~~, and had no relation to the capacity of the canal or the supply ~~only~~ from the pond, and such was evidently the case, too, with the ~~the~~ last ones. Both sets of culverts were a departure, for present ~~sent~~ needs only, from the first design of building large gates across the head of the canal, sufficient for a supply to ~~its~~ full capacity. That design was carried out, for the evidence ~~nce~~ shows that the work on the canal, the digging, was com- ~~com~~ menced May 12th, 1839; that the head gates were com- ~~com~~ menced about in June, 1839, and finished the latter part ~~t~~ of that year, the work taking five or six months; that ~~the~~ the dam was commenced about the latter part of 1839; ~~that~~ the work on the canal progressed with great rapidity ~~in~~ in the year 1839, so that by the end of 1839, some parts ~~parts~~ of the canal were finished; that the work on the dam ~~and~~ and canal was continued on during the years 1840 and 18~~41~~41, and the water let into the canal in 1842; that before ~~the~~ the water power was finished there came a freshet, break- ~~ing~~ ing the bank of the canal in a dozen places, as stated by ~~the~~ the witness, and that it took nearly a year to repair ~~the~~ the damage. At this freshet the head gates were washed ~~out~~ out. These gates were built across the canal, with stone abut- ~~abut~~ ments on each side. There were at least eight of them ~~em~~, and perhaps ten; the aggregate of spaces between them ~~for~~ for the water, exclusive of the posts, being thirty-three feet ~~and~~ and four inches in width, in the opinion of the witness who made them, and the depth from four to five feet. It is evident from the testimony, that whatever their accurate size may have been, they were built of sufficient size to answer the capacity of the canal, in the contemplation of its projectors. Frederick T. Frelinghuysen says, after they were

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finished he attempted to walk across them, that his head got dizzy and he abandoned the attempt; and that he thinks the whole width of them was between forty and fifty feet, including the timber between the gates. Andrew Fleming says, that he was down by the head gates after they were put in, and walked across them; that the work was a strong, well made frame, braced from the posts to the bottom sills, and that the ends of the timber work connected to stone walls, one at each end. How long these gates remained in is not clear, but the evidence referred to, with other in the case, shows that they were in the main finished. Theodore F. Mann, the engineer, swears that he was present when they were washed away; that it was on a Sunday night; that the water came over the embankment and washed them away; that it was about the year 1841. David T. Runyon says, that he thinks these gates were washed out in December, but it might have been further along in the winter. He does not give the year. He says, that the water got under the frame work of the head gates, and washed it out, so that the frame work was all kind of turned over or turned upside down; that that is the way the gates laid that winter, and that they went on and filled up the space back of the gates, between them and the river, with flax, tow, and other things, so that they laid in that position until the next summer, when they undertook to take the timber apart and out; that a good deal of it was under the water in the mud; that they got out all they could, then commenced to frame the timber over again to build other head gates; that they raised their bents and were washed out again; that these gates were not as wide as those first put in; that after that they filled up the embankment with earth, dug through the embankment, and put in what they call a trunk. Without referring to the evidence in detail, I think that the weight of it is that the first head gates remained until the winter of 1840 and 1841; that during the summer of 1841, an effort was made to rebuild them of less size, and that failing, the smaller trunks were put in

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under the embankment in or about the year 1842, or shortly before, in contemplation of the water being let into the canal for use in that year. But however that may be, the first head gates were erected and substantially finished, and the whole work was then so far developed and in progress, as to exhibit the general extent and scope of the enterprise, and the relation of the gates to it. The whole work was about three years in its construction. When the act was obtained the dam was in course of erection, the head gates had been built, and the canal in progress, and from that time the whole work proceeded, the same being ready for use about the summer or fall of 1842.

Now assuming, as stated, that the consent was obtained before the act of the legislature, which is according to the weight of the evidence, there can be no doubt that the work was carried on, and the large expense necessarily attending it incurred, upon the faith of that paper. The proof of its contents is satisfactory that it gave a right and consent to build the dam for the purpose of a water power company, and to divert the Raritan river, or so much thereof as might be necessary for the accomplishment of the water power. There is no evidence that it was sealed. It was merely a written paper, signed by the owners. Theodore Frelinghuysen swears that he had examined it, and read it over carefully, critically, to see if it was sufficient. He is, and was a lawyer at the time, and although interested in the company, his truthfulness is beyond question. His statement of the fact of the paper and its contents, is consistent with the fair inferences to be drawn from the general facts and features of the case, consistent with the evidence of Davis, who signed the paper, and consistent with what would naturally be inferred from the apparent acquiescence of the owners, without objection, in the progress of the work, all of whom (the owners who signed the consent) were living till after its completion. Of the accuracy of Theodore Frelinghuysen's statement of the contents of the paper, so consistent as it is with all the probabilities of the case, I have no doubt. Its terms were

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general ; to divert the Raritan river, or so much thereof as might be necessary, and they are sufficient to embrace the whole work to the extent of its capacity, even to the diversion of the whole river, if necessary. Upon the strength of that paper the canal and dam were built, and the original gates put in. The work was all on land acquired and owned by the company, not on that of the owners interested in the diversion, below the dam. The necessary operation of the works would be to divert water from below ; but the works and the land on which constructed were the company's. No question can therefore arise concerning the effect in equity of a license executed on land of the licensor. If we treat this paper simply as a license, the defendants will then stand upon a license executed on their own land by a large expenditure of money in permanent works and improvements, the necessary operation and enjoyment of which will be to divert the water from below, and upon the extent of their right to do which, the utility of the works will depend. It is unnecessary to consider the effect of such a position at law. The equitable rights of the parties are now under inquiry. To the extent that the license is executed, equity will not disturb it or permit its revocation. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the statute of frauds, and to defeat such a purpose will, upon proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee. To this extent, at least, the doctrine here invoked is sustained by the cases. *Rochdale*

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Canal Company v. King, 16 *Beav.* 630; *S. C.*, 7 *Eng. L. & E.* 208; *Duke Beaufort v. Patrick*, 17 *Beav.* 60; *Wood v. Sutcliffe*, 8 *Eng. L. & E.* 217; *Hulme v. Shreve*, 3 *Green's Ch.* 116; *Angel on Water Courses*, § 318, &c.; *Rerick v. Kern*, and note, 2 *Am. Lead. Cas.* 733; *Wetmore v. White*, 2 *N. Y. Cases in Error* 87; *Jacox v. Clark*, *Walker's Ch. (Mich.)* 249; *Payne v. Paddock*, *Ibid.* 487.

The written consent shows an intention on the part of those who signed it, that the projectors of the water power should expend their money, build their works, and divert the water of the river as far as necessary. The action of Gaston and his associates, before and after the incorporation, by the large outlay and magnitude of the works, (for in those days they cost from \$75,000 to \$100,000, the gates alone first erected costing about \$1400,) shows that they, in good faith, relied upon that consent; and now to deprive them or their successors of the benefit of it, when it is necessary for the enjoyment of their property, would be so inequitable and unjust, that the court will look beyond mere defects in the legal assurance of the right, and if possible prevent such a result. No compensation can be required in this case from the defendants, as it is evident that either none was intended in money, or if any was agreed on, that it must have been paid to the former owners, and such will be presumed after this lapse of time, there being no evidence to the contrary. It is difficult, however, to resist the conclusion that the consideration to the owners for their consent was not money, but consisted in the taking down of the Dawes dam in the year 1841 or 1842, and thereby relieving much of their land from overflow, also in benefiting the fords, and in addition thereto, the general benefit to the neighborhood by the improvement. The Dawes dam was actually taken down by the company previous to or about the time of the first diversion of the water, and there is strong ground, from the facts, to conclude that that act entered into the motive of the consent, and were it necessary to the rights of the defendants, it might well be held that

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they could compel the specific performance of an agreement to that effect.

Giving effect, then, to the consent as executed, the next inquiry is, how far has it been executed? The decree limits it to the culverts of 1843, and now remaining. The great cost of the works was in the dam and canal; the culverts were but of trifling expense. As stated, they were intended for a temporary purpose. They are only the means by which the water is carried from the pond to the canal, having no relation to the capacity of the works, and the size of which may be governed entirely by the needs of power from the canal. The license was to divert as much water as was necessary for the accomplishment of the water power. A very much smaller and less expensive canal would have answered for those culverts, if they were to be taken as the test of the execution. The water power was notoriously intended to encourage and build up manufacturing establishments at Raritan, and the works were erected to meet the expected demand. The measure of the execution of the license is the capacity of the dam and canal, as originally constructed, regarding the culverts only as a means of supply, according to the necessity of business, and liable to any change in their location or construction the better to enjoy the benefit of the dam and canal as originally built and completed, the equity being that the defendants shall, if necessary, have the full use of the expenditure made on the faith of the consent within its terms and depending upon it. This, to my mind, is to be regarded as the scope of the execution. If the equity of the defendants depended upon the presumption of a right by grant, based upon an adverse user of the water, then the extent of the actual user would alone be regarded, but in this case it depends upon the extent of the execution of a license. If, however, we should consider the mode of obtaining the water from the pond to the canal as any test of the execution, then the original gates should be taken as the measure in this cause. They were constructed of large size and probably sufficient for the full

capacity of the canal; the amount of water to be discharged through them to be regulated by the demand. That they were not replaced, does not detract from the effect of the execution as to them, as a part of the work, for, as will be seen, there was no abandonment of the right to put them in again if necessary.

The next question is, whether the same equities exist against the complainants as against those who signed the consent. An equitable estoppel will affect a subsequent purchaser to the same extent as his grantor, when he has had actual notice of the condition of things upon which it is based, or when the circumstances are such as to put him upon inquiry to ascertain the facts. The cases on this point are too numerous to cite; many are collected in the note to *Le Neve v. Le Neve*, 2 *Lead. Cas. in Eq.* 127. (See also 2 *Am. Lead. Cas.* 770, 4th ed.) Notice is either actual or constructive, and what amounts to constructive notice depends much upon the facts of each case. The recent case of *Hoy v. Bramhall* in this court, 4 *C. E. Green* 563, well adopts the general rule "that whatever puts a party upon an inquiry amounts, in judgment of law, to notice, provided the inquiry became a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding." That case also accepts the rule of Wigram, Vice Chancellor, in *Jones v. Smith*, 1 *Hare* 43, that where the party has had actual notice that the property was in fact charged, encumbered, or in some way affected, the court has bound him with constructive notice of facts and instruments, to the knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstances affecting the property, of which he had actual notice; or, as stated in the note to *Le Neve v. Le Neve*, 2 *Lead. Cas. in Eq.* 160, gathered from the cases there cited, "whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, and to enable him to ascertain their nature by inquiry, will operate

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as notice." And to show how far this doctrine has been applied, the case of *Hervey v. Smith*, 22 *Beav.* 299, is an illustration.

Now, in view of these principles, the complainants and the grantors of such as did not purchase immediately from the representatives of the owners who signed the consent, had actual notice that a considerable part of the water of the river was diverted by the water power. The fact of the diversion, and the cause, they could distinctly see. That it was done by means of the dam and canal, and that several mills and factories were supplied by the water, was apparent. The canal was in sight of their lands, and dependent upon the river for its supply. The necessary effect of its use was to divert water therefrom, and considering its size and apparent design, the slightest drought would have induced the belief that it had not yet been used to the extent of its capacity. Having notice that the river was being diverted in this way, and the scope of the means by which it was done, they were in duty bound to ascertain by proper inquiry, the nature and extent of the right to do it. They failed to make inquiry when they should have done it in justice to the rights of the company, and for their own protection. The complainants, under the facts of this case, are in no better situation than those who gave the consent.

It was further contended, that the defendants had abandoned their right, if any they had, to divert more water than they had used through the present culverts. The act of incorporation allowed the company to divert only as much water as was necessary for the purposes of the act, and such also was the intention of the license. The diversion could not exceed what was reasonably necessary and proper for the time being to supply the demand. Any waste or diversion beyond the demand, would have been an infringement of the rights of the owners below the dam. They were entitled to the natural flow of the water, except only so far as the uses of the company under the license would affect it. The non-user by the company beyond the exist-

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ing needs, within the limits of the present culverts, and the consequent flow below the dam, were not inconsistent with each other. The company could not use any more water than the demand required, and whatever was not so used necessarily came to the complainants' land, and in which they had their natural rights. The non-user by the company, and the corresponding flow below the dam, were in harmony. No adverse enjoyment can be set up by the complainants under these circumstances, and the question of abandonment therefore rests simply upon whether the company intended to relinquish their right beyond the scope that it had been exercised with the present culverts. The reason urged to support the abandonment, is non-user beyond those culverts. To accomplish an abandonment, the facts or circumstances must clearly indicate such an intention. Abandonment is a question of intention. Non-user is a fact in determining it, but is not, even for twenty years, conclusive evidence in itself of an abandonment. Its weight must depend upon the intention to be drawn from its duration, character, and accompanying circumstances. *Washb. on Easem.* 551-6; *Crossley v. Lightowler*, *Law R.* 3 *Eq.* 279; *Ward v. Ward*, 14 *E. L. & E.* 413; *Queen v. Chorley*, 12 *Q. B.* 515; *Stokoe v. Singers*, 8 *E. & B.* 31.

The non-user in this case is accounted for on the ground that the company were obliged to refrain from any use beyond the demand. They had no option to use or not, further than the limit of the demand for the time being, and an intention to abandon any of their rights under the license as executed, cannot therefore, be drawn from a consistent use therewith, and a failure to violate its terms, and the provisions of the charter. The non-user in this case is peculiar. It is not a total non-user. The works were maintained and used, but the project was not as successful as expected, and the use was therefore only correspondingly limited, not given up. It is very different from where there is a total cessation of use, consequent upon a tearing down of works, or allow-

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ng them to go to decay, or other circumstances from which an indication to relinquish the improvements may be drawn.

The fact that the original gates were not rebuilt, but culverts of much less size inserted, is explained by the evidence that the effort to replace them, even of smaller dimensions than the first, was not successful on account of a storm, and that the sluiceways and culverts were built only for a temporary purpose, and as a sufficient means at the time for the probable demand. It is evident from the testimony that the company had no intention to abandon any right, by not immediately replacing the first gates. Had the original gates been replaced, the diversion, as already stated, could not have exceeded the demand, and within that limit it could have made no difference to the owners below the dam, whether the diversion was through them, or the present culverts. There is nothing in the case from which an intention to abandon the right to use the works, as executed under the license, can be fairly drawn.

The remaining question on the merits is, whether the defendants should be enjoined from erecting their new gates, and extending their canal to them. The present culverts have always been, and are liable to obstructions by logs of wood, and rubbish, are out of view, and difficult to clear out and manage. Besides, the foundation is of quicksand, and the stone work about the gates is liable to fall, owing to the obstructions; there has been at times an insufficient supply of water. In order to obtain a good foundation, and to be relieved from the difficulty of the present culverts, the company have selected and purchased a site for new gates about ten chains above, where they can have shell rock for a foundation, and propose to extend the canal further, and to erect their gates. The point selected seems to be as near to the present head of the canal as practicable, to secure a good foundation. The gates, as proposed, will be two in number, and of the aggregate width of sixteen feet in the clear; about half the width of the original gates. It will

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not be possible with them to divert as much water in volume as through the first gates, and they will not be equal to the capacity of the canal as already constructed, with the dam at the height of two and a half feet above the ordinary level of the water, as erected. The company would have no right to change the location of their gates, and extend their canal, or alter it so as to divert beyond the capacity of the canal as constructed, with the dam of the height as stated, but any alteration within those limits cannot affect the complainants. Whatever the size of the gates might be, the use must always be reasonably commensurate with the demand, and relief against any excessive use could be had. When the demand is liable to be increased by additional mills, factories, or works, such as the water power was intended to encourage, and in view of which the license was given, there would be no equity in compelling the company always to keep their gates of the exact size necessary for the immediate supply, and to submit to the expense of a change when more is required. The gates are not the test of the right to use the water, and whether the supply is through small or larger gates, cannot be questioned by the complainants, as long as they are within the limits of the capacity of the canal in its relation to the dam, as both were constructed. The fact of gates being built of larger capacity than necessary for the immediate demand, can no more be a cause of complaint by the owners below, than that the canal is larger than at present necessary, and the use of which was allowed, and expected to lie dormant until expanded by the growth and necessities of business.

The capacity of the new gates to divert water, with the canal extended, will clearly be within the limits of the capacity of the canal and dam as originally constructed, and also within the limits of the first gates. The extent of user must depend upon the demand, and the mere change in the mode of diversion does not prejudice the rights of the complainants. There is no present ground of complaint at

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against the new gates, and the extension of the canal to the site proposed.

On the merits, the decree of the Chancellor must be reversed, and the bill be dismissed with costs in both courts.

For reversal—BEASLEY, C. J., BEDLE, DALRIMPLE, DEPUE, KENNEDY, OGDEN, SCUDDER, VAN SYCKEL, VAIL, WALES, WOODHULL. 11.

For affirmance—OLDEN.

WEISSENBORN, appellant, and SIEGHORTNER, respondent.

This was an appeal from a decree of the Chancellor, made in accordance with his opinion in the cause, reported in 5 *C. E. Green* 177.

The appeal was argued by *Mr. A. P. Whitehead* and *Mr. Bradley*, for appellant; *Mr. A. Zabriskie* and *Mr. C. Parker*, for respondent.

No opinion was delivered. Upon argument, the following decree was directed to be entered:

Whereupon, this cause coming on to be heard, and the court having advised of the same; it is, on this 3d day of December, 1869, ordered, adjudged, and decreed, that the order of the Chancellor be reversed, so far as it relates to the appointment of a receiver, but that the injunction be retained and continued until the final hearing of the cause; provided that the respondent (the complainant below) stipulate and submit to be enjoined to the same extent as the defendant stands enjoined; with liberty to either party to apply to the Chancellor to take such order for collecting and preserving the assets of the firm as he may deem advisable. And it is further ordered and decreed, that the respondent pay to the appellant his costs in this appeal, and that the proceedings be remitted to the Court of Chancery, to be proceeded in according to law.

Camden and Amboy Railroad Co. v. Stewart.

MARCH TERM, 1870.

THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANY, appellants, and STEWART, respondent.

1. An appeal lies to an order of the Chancellor sustaining exception ~~to~~ to a bill for impertinence.
 2. With respect to appellate jurisdiction, there is a class of cases to which no certain test can be applied, but each case of such class, in this particular, must be adjudged by its peculiar circumstances.
 3. The case should be especially clear, to warrant the expunging of matter from pleadings as impertinent; but when the Chancellor has struck out statements from a bill which are very prolix, and appear to be of but small importance to the case, this court will not interfere with such order.
 4. A deposition of a deceased or foreign witness, appended to an injunction bill, is not competent in the absence of proof that the suit in which it was taken was between the same parties and related to the same subject matter, and the only legitimate proof of such deposition is by a compared or duly certified copy.
 5. There is no relaxation of the rules of evidence with respect to affidavits annexed to injunction bills.
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The bill was for the specific performance of a contract alleged to have been made by the respondent, who was the defendant below, to convey a tract of nine acres of land, and to grant a right of way in front of his other lands, for the railroad of the complainants. This contract was contained in the following receipt, which was set forth in the bill, viz: "1832, Sept. 15th. Received of E. A. Stevens his check on Trenton Bank, dated December 1st, 1832, for the above sum, for which I agree to execute a deed of conveyance of the above tract, in conjunction with Mrs. Stewart, and also a grant of the right to pass in front of my premises with said railroad, the said company furnishing me with suitable passage ways to the river, for which said check, when paid, will be in full." The bill alleges that at the time of the execution of this contract the complainants were constructing their road, "based upon the idea of a double track."

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The bill then contained certain other statements which were the subject of exception by the defendant, on the ground of impertinence. These statements are sufficiently indicated in the opinion delivered.

The exceptions being sustained by the Chancellor, this appeal was brought from that decision. The opinion of the Chancellor is reported in 4 *C. E. Green* 345.

Mr. Gilchrist, Attorney-General, for appellants.

Mr. J. Wilson and *Mr. P. D. Vroom*, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The question was raised on the argument of this cause, whether an order sustaining exceptions to a bill on the ground of impertinence, was subject to an appeal to this court. The objection to such a course of proceeding appeared to be that the order was one merely incidental in the progress of the cause, and which was addressed to the discretion of the Chancellor.

The language of the statute upon this subject is, that "all persons aggrieved by any order or decree of the Court of Chancery may appeal from the same, or any part thereof, to the Court of Errors and Appeals." *Nix. Dig.* 116, *pl.* 80. From the terms here used, it is clear that the intention was to give a wide scope to appeals. The only limit imposed on the right is the circumstance that the party appealing must be, in a legal view, "aggrieved" by the order sought to be reviewed. This restriction obviously excludes from the category of appealable matters, all orders which lie wholly in discretion, and which have no tendency to affect any right in litigation. It was on this ground that this court declined to take cognizance of an appeal from an order of the Chancellor refusing to pass to a general guardian moneys derived from the sale of the minor's real estate. *In the matter of Anderson*, 2 *C. E. Green* 536. The same princi-

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ple is recognized in *Garr v. Hill*, 1 *Halst. Ch.* 641, and *The Attorney-General v. Paterson*, 1 *Stockt.* 625.

But these decisions simply show that there are specific cases which are not the objects of appeal. They provide no practical test, nor do they establish any general rule. And, indeed, a little reflection will satisfy any one that it is not possible to adopt any universal criterion. Thus, in *Rogers v. Hosack's Ex'rs*, 18 *Wend.* 329, the Court of Errors New York held that no appeal would lie from an order of the Chancellor refusing to remove an executor and to appoint a receiver in his stead, and Mr. Justice Cowen, attempting a general definition, said: "I understand the line of authorities to stand almost without exception, that to warrant a reversal upon appeal from chancery, some definite rule of law or equity must appear to have been violated." Other judges have said that any order which affects the merits of the question, or touches the rights or interests of the parties, is appealable. But any attempt to apply any of these definitions of the scope of appellate jurisdiction, will at once show that they are entirely too general and abstract to have controlling effect as rules of practice. All persons will probably admit that an order which does not, in any degree, reach to the merits of the controversy, or affect the substantial rights of a litigant, does not belong to the appealable class of orders, but the embarrassment is to provide a test by which orders having such an effect can be distinguished. In New York, the subject has undergone repeated and elaborate discussion, and yet no such test has been discovered. In the case of *Beach v. Fulton Bank*, 2 *Wend.* 225, an appeal was entertained from an order of chancery refusing to open proofs in a cause for the purpose of re-examining a witness, on the ground that such order affected the merits of the cause. On that occasion, Mr. Justice Marcy read a carefully prepared opinion, reviewing all the previous cases, the result reached being that no standard to discriminate appealable from non-appealable

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orders, could be devised. In this view the Chancellor and Mr. Justice Sutherland concurred.

This subject does not appear to have been discussed to any great extent in the English courts. But the cases in which appellate jurisdiction has been exercised cannot be arranged within any rule having inflexible boundaries. For example: The granting of an issue in a chancery suit to be tried by a jury, is generally regarded as a matter of discretion, and yet in *Hampson v. Hampson*, 3 Ves. & B. 42, Lord Eldon says: "I agree that a mistake in refusing to send the cause to a jury, is a just ground of appeal, if the Court of Appeals should think that the contrary decision would have been a sounder exercise of discretion;" and it has since even been held that where the House of Lords thought that the court below had directed issues improperly, the order directing such issues would be reversed, and the cause remitted with directions to the Chancellor to decide the matter himself. *Nicol v. Vaughan*, 2 Dow & Clark 420; 5 Bligh's Appeals 505. Vide etiam *Earl of Winchilsea v. Garetty*, 1 M. & K. 253; *Dudgeon v. Thomson*, 29 L. & E. R. 12.

Under these circumstances, it is not surprising that the English books of practice are found stating the rule, in the comprehensive language of our statute, that "any person who finds himself aggrieved by a decree or order of the Court of Chancery, is entitled, as a matter of right, to appeal to the House of Lords." 3 Daniell's Ch. Pr. 1633. The ancient order of the appellate court, requiring parties to print their cases forthwith, seems to have been designed as a preventive of appeals merely for delay and vexation, the same end being at present attained by the certificate of counsel that there is reasonable cause for appeal. *Id.* 1637.

From my examination of the authorities, and my reflection on this subject, I am satisfied that it is not practicable to settle any test, which will be applicable in every case, so as to separate into classes those orders which are appealable and those which are not. There are many cases which are

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obviously appealable; there are some as obviously not appealable; but there is an intermediate class which cannot be reduced to any fixed rule. When this latter class is to be dealt with, it would seem that this court is called upon to exercise a special judgment in each case, in view of its peculiar circumstances, and having regard to the general proposition above noticed, that an order to be appealable must go to some extent, to the merits of the controversy, or substantially affect the legal or equitable rights of the party appealing.

Looking, then, in this light at the present case, I think it has a foothold in this court. The purpose of exceptions to a bill or answer is, to strike out something which the party, whose pleading is thus assailed, has deemed important to his case. When therefore an appeal is brought in the course of this proceeding, the basis of it is, that the court below has erroneously suppressed that which the appellant insists is of moment to the complaint or defence, as the case may be. If the appellant therefore be right in such insistence, then obviously he has been aggrieved; that is, he has been deprived of his legal right to a fair statement of the whole of his case. It would be unjust to assume, *in limine*, that he is wrong in this contention, and on the assumption of his being right, a privilege which the law accords to him has been withheld. The point to be settled by this appeal is, whether the matter put out of this bill be irrelevant or not; if relevant, then unquestionably the striking out was a wrong affecting the rights of the appellant involved in the suit. Upon principle, then, I think this appeal sustainable. There is also a precedent for it to be found in the case, in the House of Lords, of *Rickards v. The Attorney-General*, 12 *Clark & Fin.* 30. It becomes, then, necessary to look into the merits of this appeal.

The point in dispute between these parties appears to be, whether the defendant, according to the terms of a certain written contract, contained in a receipt set forth in the bill of complaint, agreed to grant to the complainants a genera

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ht of way for their railroad in front of his property, or
y right of way over a single track. The bill states the
itten contract, and certain circumstances tending to show
sense in which the terms of the contract were intended
be used. After a denial that such deed or grant was
er delivered, there is an averment that in a certain suit
chancery in the Circuit Court of the United States, the
endant alleged that he had made and delivered a deed
nine acres of land, and granted therein a right for the
nplainants to pass in front of his premises with a track
a railroad. Then follows a further extract from this bill
the Circuit Court, containing an additional statement of
e defendant, that at the time he delivered this deed he
erheard a conversation between certain agents of the com-
inants, to the effect that they designed fraudulently to
ppress this deed, and to claim under the contract in the
ceipt. The bill then proceeds, after a few unimportant
erments, to extract from another and subsequent bill filed
the defendant in the same Circuit Court, an account of
e alleged delivery of this same deed, which it is con-
ded is inconsistent with the first above mentioned state-
ent of the same affair.

Now I think it can be gathered from the contents of this
ll, although it is defective in not containing a direct aver-
ent to that effect, that the complainants anticipate that the
fendant will set up, by way of defence, that he delivered a
rtain deed which was received as an execution of the
ritten contract upon which the suit is based. Upon this
pposition the complainants had the right to suggest in
eir bill such anticipated defence, and to aver the existence
circumstances within the knowledge of the defendant,
hich were calculated to overthrow it. It is always to be
remembered that a bill in equity has a two-fold purpose.
he first is to bring before the court and to put in issue the
cts upon which the complainants right to relief rests;
us far the bill is equivalent to a declaration in an action in
e common law courts; but it is likewise an examination of

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the defendant for the purpose of obtaining evidence to establish the plaintiff's case, or to counter-prove the defence which it is supposed may be set up in the answer. I think, therefore, the general rule must be, that the complainant must be permitted to set forth any fact, the admission of which by the defendant, will go either to establish the complainant's own case, or overturn that of his adversary. This I understand to be the established doctrine. It seems to me, therefore, the complainants in this case had the right to inquire into facts or circumstances within the apparent knowledge of the defendant, or into any declarations or admissions made by him with respect to the alleged delivery of the deed in question. But such circumstances or admissions must be of a tendency to benefit the complainants. The testimony sought for must in some way appear to be of use to the party seeking it, otherwise it is useless in the case, and serves but to cumber the record. In the present instance, the testimony sought to be evoked by the extracts referred to, are held to be important, inasmuch as they show that the defendant has given inconsistent accounts of the transaction, during which he alleges he delivered the deed in dispute. If this were so, and the examination upon the point were conducted with the requisite brevity, it seems to me that the inquiry would be both pertinent and important. I must think the complainants have a right to ask the defendant himself if he has not given inconsistent accounts of the very matter which it is anticipated is to be relied upon as a defence. But after a careful collation of the extracts from the bills of the defendant, I cannot perceive the least inconsistency between them, considered as narrations. The incompatibility relied on consisted in the alleged fact, that the defendant said in the first conversation, that he heard a certain conversation which he denied that he heard in his second bill. But it is obvious that the conversation which the defendant said he heard, was not the same to which he subsequently refers, because he expressly declares that the conversation which was heard by him was after he had de-

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livered his deed, while the latter one to which he alludes, was before the delivery of the deed. As there is no incongruity, the result is that we have at great length two extracts from chancery bills, to the effect that the defendant claims that he delivered a deed in execution of the written contract, containing a right of way to the complainants for a single track. Such prolixity of statement in so simple a matter is not proper, and amounts to impertinence. I fully concur in the views upon this subject of Mr. Vice Chancellor Bruce, in *Davis v. Cripps*, 2 *Younge & Coll.* 443, expressed in the following terms: "The court in cases of impertinence ought, before expunging the matter alleged to be impertinent, to be especially clear that it is such as ought to be struck out of the record, for this reason, that the error on the one side is irremediable, on the other not. If the court strikes it out of the record, it is gone; and the party may have no opportunity of placing it there again. Whereas, if it is left on the record, and is prolix or oppressive, the court, at the hearing of the cause, has power to set the matter right in point of costs." But this consideration addresses itself principally to the judgment of the court below. It ought to be a clear case, manifestly showing that the party complaining will lose substantial rights, to induce this court to annul an order of the Chancellor finding impertinence in the proceedings before him. Even if I perceived that the complainants might be subjected to some inconvenience or slight loss by this striking out, I would not feel justified in interfering with this order, inasmuch as there is clearly in the statements embraced in this first exception, too great prolixity. In *Slack v. Evans*, 1 *Price* 278, *note*, Lord Eldon uses this language: "If I decide with the master, I must decide that the prolixity is not impertinent, which I should be reluctant to do. If, in an examination, the examinant sets forth tradesmen's bills at length, it is impertinent. So a prolix setting forth of pertinent matter is itself impertinent."

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Upon these grounds I think the appellant is not entitled to prevail on this first exception.

The second exception is but an adjunct of the first, and must consequently also be sustained.

With regard to the third exception I have but little to say, as it seems to me so obviously well taken.

Its purpose is to object to the introduction into the bill of the recital in full of two deeds. The first purports to be a copy of a deed for the nine acres of the land in question, from the defendant to the complainants, and the grant of a right for a railroad track in front of his land; the second is a copy of another deed which it is said the defendant tendered to the complainants, upon learning that the former was not forthcoming. The two deeds are in all respects alike, with the exception that the former of the two contains a covenant on the part of the railroad company which has no pertinence to this issue. During the argument I listened attentively for some plausible explanation of the use in this bill of these transcripts or either of them. I failed to hear, or if I heard, to understand any such explanation. I am not able to conjecture any event in which this elaborate statement can become advantageous. These deeds are in accordance with the admitted understanding, except as to the disputed point as to the right of way. In that particular they are but a written statement of the intention of the defendant. It does not seem to me that it can in any respect whatever benefit the complainants, to have the admission of the defendant that he reduced this intention of his to writing, and delivered or tendered it to the complainants. This appears to be the entire purpose of this part of the bill, and admitting its usefulness, it certainly was unnecessary to present it in a form so verbose. The whole point of the inquiry could have been propounded in half a dozen lines. Such prolixity as this constituted, as I think, clear impertinence.

The last exception embraced in this appeal relates to the suppression of the deposition, annexed to the bill, of Mr.

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Stevens. This was one of the proofs sustaining the case made by the bill, and intended to be used for the purpose of obtaining and sustaining an injunction. In an affidavit also annexed to the bill, it is stated by the affiant "that he acted as counsel for the above complainant in a suit brought against the said complainant by Charles Stewart, in the Circuit Court of the United States for the District of New Jersey, being one of the suits referred to in the bill in this cause as having been brought in that court; that Edwin A. Stevens was sworn as a witness in said cause in said Circuit Court of the United States, and testified in deponent's presence and hearing, as set forth in the schedule to this affidavit annexed." It also appeared in this affidavit that Mr. E. A. Stevens was out of this state.

The question is, whether the deposition of Mr. Stevens was, under these circumstances, competent evidence? It is insisted that it appears to be a deposition taken in a suit between the same parties. But this is not enough. It must be shown that the suit related to the same subject matter. This does not appear. I also agree with the Chancellor, that the only legitimate proof of a deposition is by a compared or duly certified copy. "With regard to the proof of depositions in chancery," says Greenleaf, Vol. I, section 516, "the general rule is that they cannot be read, without proof of the bill and answer, in order to show that there was a cause depending, as well as who were the parties, and what was the subject matter in issue." I am not aware that there is any relaxation of the rules of evidence with respect to affidavits annexed to injunction bills.

I think the decree of the Chancellor should be in all respects affirmed with costs.

The whole court concurred.

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GRIGG, appellant, and LANDIS, respondent.

1. Penalties, forfeitures, and securities for conditions broken, are ~~not~~ not favored in equity. They are usually held to be securities for the pay~~ment~~ment of money, and the performance of conditions, when compensation ~~can~~ can be thus made.

2. Covenants contained in deeds and agreements, prescribing the ~~mode~~ mode in which the premises shall be improved, and in restraint of their use, w~~ill~~ill be sustained, within reasonable limitations.

3. Time may be made of the essence of a contract in equity b~~y~~y the express stipulations of the parties, or it may arise by implication from ~~the~~ the nature of the property, or the avowed objects of the seller or the purchaser.

4. Circumstances inconsistent with an intention to enforce a strict ~~com~~compliance, such as proceeding with the purchase after an actual and ~~com~~complete breach, will be construed as a waiver.

5. A knowledge of the breach before waiver will be presumed, where the facts shown are such that the party should be charged with notice in ~~favor~~ favor of equitable rights consequent upon such supposed waiver.

6. Where time is of the essence of a contract, the party having the ~~option~~ option to insist must make the point promptly, before other equities intervene.

7. A collateral covenant restraining the assignment of an agreement will not be enforced in equity, where it appears in the contract that such ~~re~~restraint is but an incident to the objects of the principal covenants ~~which~~ which have been substantially performed.

The opinion of the Chancellor is reported in 4 C. *E.* Green 350.

Mr. Browning and Mr. Carpenter, for appellant.

This is a bill for the specific performance of a contract of sale, made September 1st, 1864, by which Charles *Li.* Landis agreed to sell to one Samuel K. Foster, ten acres of land, at Vineland, in this state. Foster to pay therefor \$420, in installments, with stipulations in the agreement on the part of Foster, to plant shade trees in front of the property before the first day of November following, to erect on it a habitation within one year, to cultivate two and a half acres each year, to keep the sidewalk in front clear of underbrush, &c. And

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it was further provided, that in the event of Foster not complying with the above stipulations within the time specified, Landis to have the right to take back the land on repaying the amount received on the purchase. It was also stipulated that Foster should not have the right to assign before the above improvement stipulations were complied with, or unless, in case of failure, Landis should decline to take the purchase back, and refund the money received. The object of these stipulations being declared to be to secure the general improvement of the settlement, and to protect it against the speculation of non-improvers, &c. Further, the road-side to be seeded to grass within two years, and the agreement not to be assignable unless all installments due are paid. Warrantee deed to be given when the purchase money should be paid, and the improvement stipulations complied with.

Foster entered into the possession of the lot sold, after payment of a part of the purchase money only, but before the payment of the whole, and, before performing all the improvement stipulations, on 23d October, 1865, assigned and sold his interest under this agreement to Thomas Grigg. Thomas Grigg paid the whole of the purchase money not paid by Foster, to Landis before it became due. He performed all the improvement stipulations, including the erection of a dwelling-house on the premises, at an expense of \$1000, but not within the time prescribed. The house should have been built in one year, and before September 1st, 1865, but it was not fully completed until 1st January, 1866.

On March 13th, 1866, Landis, by a letter directed to Foster but delivered to Thomas Grigg, declared the agreement forfeited for non-compliance with the covenants. This was on the ground that the covenants were not strictly performed within the precise time limited, and because Foster had sold and assigned his interest in the land before the improvement stipulations had been fully complied with.

The complainant insists in this case that these stipulations as to time, are not so of the essence of the contract as that

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if not strictly performed within the precise time, such failure will of itself work a forfeiture of the contract. These stipulations are good as a means of enforcing payment, and also the performance of the improvement stipulations, and they will not be held, under ordinary circumstances, as grounds of forfeiture. There are cases in which, under such stipulations, courts have refused to enforce specific performance, not on the broad ground here taken, that *time* in such cases is of the essence of the contract, but on account of the unreasonableness of the circumstances under which relief was asked. Such are the cases cited in the opinion delivered below. *Benedict v. Lynch*, 1 Johns. Ch. 370; *Smith v. Wells*, 7 Paige 22, 24.

The injustice which may be done to purchasers under the strict rule laid down in the opinion of the court below, may be the better appreciated by referring to the character of the sales made in the settlements now in progress in the southern part of New Jersey. Many thousand acres are being continually sold under these agreements, the vendors securing the payment of the purchase money agreed upon by withholding the deeds until the payments are completed and the improvement stipulations performed. If the purchasers are to lose all the money expended in improvements by the failure to comply strictly with the stipulations as to time, the vendor, after the increased value given by the vendee, and the rise of value from the general improvement of the neighborhood, may increase his profits by a severe enforcement of the letter of his contract, without any opportunity of redemption given to the debtor. That this fear is not baseless, is seen in the statement of the clerk of Landis, that they had paid back to purchasers since the 21st September, 1865, when Mr. Landis began his work of confiscation, between \$40,000 and \$50,000 on forfeited agreements. This account is given on the part of Landis himself. What an amount of distress and anguish is involved in this course on his part.

The doctrine, on the other side, that these stipulations are

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to be taken as strict conditions, failure as to which in time merely, will not merely justify a delay in the delivery of the deed till the contract is fully performed, but the absolute forfeiture, places probably half of such holders at the mercy of Landis.

As to the claim against assignment, it stands, we suppose, on the same footing. The general doctrine as to this question of strict performance, is stated by Story in 2 *Eq. Jur.*, §§ 1315, 1316.

We had, before the decision of this case below, considered that such stipulations could not be causes of forfeiture, simply because not performed strictly within the time prescribed. We say *simply*, because there may be circumstances which will make it inequitable to ask for specific performance. The cases cited in the opinion below we take to be of this character.

Such stipulations are in reality intended for and ought to be treated as a means of enforcing performance of what is undertaken; they are conditions precedent to the right to demand a deed, whether for the payment of money, or for the performance of improvement stipulations. In this light the transaction is in the nature of a mortgage; a pledge of the property in the hands of the vendor, and the principle applies that once a mortgage always a mortgage. A mortgage cannot, by agreement, be made irredeemable. *Coote on Mortgages* p. 11, (*Law Lib. ed.* 1840); 4 *Kent* 142 (5th ed.); 2 *Story's Eq. Jur.*, § 1019; 3 *Lead. Cas. in Eq.* (*Amer. notes*) p. 75; *Youle v. Richards*, *Saxt.* 535, 537-8; *Edgerton v. Peckham*, 11 *Paige* 352, 357, 362; *Remington v. Irwin*, 2 *Harris* 143; *Taylor v. Longworth*, 14 *Peters* 172.

If vendor sees vendee make improvements and does not demand a strict performance of the contract, equity will not enforce a forfeiture, but will decree a conveyance. Standing by and observing work done, as a house built, and then attempting to confiscate, was a fraud. *Farley v. Vaughn*, 11 *Cal.* 227; *Townsend v. Lewis*, 35 *Penn. State Rep.* 125; *Murphy v. Lockwood*, 21 *Ill.* 611.

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Time is not generally of the essence of the contract. *Fry on Spec. Perf.* *312; 2 *Story's Eq. Jur.*, § 1323; *Harris v. Troupe*, 8 *Paige* 423; *Falls v. Carpenter*, 1 *Dev. & B.* 237; *Young's Adm'r v. Rathbone*, 1 *C. E. Green* 224.

The cases cited in the opinion below are entirely consistent. The case of *Benedict v. Lynch* (1 *Johns. Ch.* 370), stands upon its special circumstances and rightly decided. Of the case of *Smith v. Wells*, (7 *Paige Ch.* 22), the same applies. The Chancellor in this case intimates the true ground, when he says that when inequitable the court will relieve against a stipulation making time of the essence of the contract. There no money had been paid or expended in building, and no circumstances addressed themselves to the conscience of the court to induce it to relieve the purchaser. Here, not only the money has been paid, but a large expenditure in improvements. It seems to us to be a monstrous proposition, that the purchasers shall be called on to make improvements through periods of time, more or less, and that if not completed within the precise time the moneys expended shall be forfeited.

The acceptance of the final payment after the work had been done out of time, was necessarily a *waiver of time*.

Lastly, as to the matter of assignment. It really depends upon the same questions already discussed, with, we suppose, the point, that all such restraints are against the policy of the law, and void.

Any estate or interest in land may be assigned, as an agreement in writing to convey land, which may be enforced by bill for specific performance. 4 *Greenleaf's Cruise* *89; *Currier v. Howard*, 14 *Gray (Mass.)* 511; *Fry on Spec. Perf.* *51.

Grigg here stands in the place of Foster, and may file the bill in his own name. He might, under our statute, even bring suit at law in his own name, if his proper remedy was there. See act March 14th, 1863, *Nix. Dig.* 613, pl. 25 (ed. 1868).

The right to limit the assignability of contracts applies to

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other subjects. It is, 1. When the contract is personal, as to paint a picture, &c. 2. In the cases of *leases*, when the responsibility and personal character of the tenant enters into the contract. It is obvious that such reasons fail in this case.

The distinction between a purchase and a lease was taken in the case of *Weatherall v. Geering*, (12 Ves. 504), where it is said: "In the case of a purchase there is no conveyance without the money, and it is indifferent to the vendor from whom he receives it; but the relation of landlord continuing, there are many circumstances which it is very important for the lessor to consider."

Mr. J. T. Nixon and *Mr. C. Parker*, for respondent.

The opinion of the court was delivered by

SCUDDER, J.

Upon bill filed by the appellant for the specific performance of a contract to convey lands, entered into between the respondent and Samuel K. Foster, and assigned to the appellant, the Chancellor has decreed that the bill be dismissed with costs, and an appeal has been taken to this court.

This contract, dated the 1st day of September, 1864, for a money consideration, and upon compliance with the covenants therein contained, bargains for the sale and purchase of a lot of land, containing ten acres, in the Vineland tract, Cumberland county. The money consideration is the sum of \$420, payable as follows: \$50 cash; \$270 on September 5th; a note for \$51.50 at six months; and balance of \$50, by yearly payments, within three years, with six per cent. interest, payable yearly, on the 1st day of November.

The covenants to be performed by Foster, were: (1) to plant shade trees in front of the property, before the 1st day of May, or November, next following; (2) to erect a habitation thereon, for purposes of occupancy, within one

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year from the date of the contract; (3) to cultivate at least two and a half acres each year, from the date thereof; (4) to keep the road or sidewalk in front of said property, clear of underbrush or rubbish.

"And in the event of the said S. K. Foster not complying with the above stipulations within the time specified, the said Landis to have the right to take back the said land by paying to the said S. K. Foster the amount he (Landis) has received on account of said purchase." Foster was not to have the right to assign said land, or any part thereof, before the above improvement stipulations were complied with, or unless, in case of failure or inability to make said improvements, said Landis should decline to take the purchase back by refunding the money he had received upon the same. The object of these stipulations, as therein stated, was to secure the general improvement of the settlement, and to protect the same against the speculation of non-improving people upon those who improve their lands.

Following the above statement, it is stipulated that the houses shall be at least seventy-five feet from the side of the road; that the side of the road in front of said land shall be plowed and seeded to a good seeding of grass, within two years; that this agreement is not assignable unless all installments fallen due are paid.

A warrantee deed, in fee simple, clear of all encumbrances, was to be given when the purchase money was paid, and the above improvement stipulations complied with, and in default of complying with said stipulations, to forfeit to the said Landis, or his assigns, \$50 per annum.

I shall not stop to criticise or attempt to construe in all its parts a paper so inartificially drawn. The general intent and the more important parts are sufficiently intelligible for our present purpose.

The appellant, Thomas Grigg, on the 4th day of January, 1866, paid the balance of purchase money to Charles K -

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Landis, and received a receipt in full, in Foster's name, and on his account, as Landis' agent supposed. About the 1st day of March, 1866, and between that day and the 13th day of the same March, Mr. Grigg demanded a deed for the above tract of land in his own name, alleging that all the purchase money had been paid, all the improvement stipulations complied with, and that the contract had been assigned to him by Foster. The deed was refused. Grigg had been in actual possession of the property from the date of the contract (as the agent of Foster) until the contract was assigned to him, and afterwards, as he claims, in his own right, to the present time.

Immediately following the demand of the deed by Grigg, March 13th, 1866, Mr. Landis addressed a notice to both Foster and Grigg, stating that he had declared the agreement for the lot "*forfeited for non-compliance with the covenants of agreement.*"

A check was also sent by Mr. Landis' direction to Mr. Foster, for four hundred and twenty dollars, the amount of principal of the purchase money received, which was returned not accepted. On April 23d, 1866, Mr. Landis sent his father to Monson, Massachusetts, where Foster resided, and there tendered him the same amount in United States legal tender notes. Foster made no objection to the kind of money, but refused to accept, and said he had contracted with the appellant, Grigg, for the land. He had actually assigned the contract, by writing, endorsed October 23d, 1865.

No tender was made to Grigg of the money. The issue thus made between the parties is whether the respondent has the right to declare the contract of sale forfeited for the alleged non-compliance with the covenants contained therein, and refuse a specific performance by executing a deed for the premises to the appellant.

Penalties, forfeitures, and re-entries for conditions broken are not favored in equity, and constitute a large branch of equitable relief. Usually, they are held to be securities for

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the payment of money, and the performance of conditions, and where compensation can be made for non-payment and non-performance, equity will relieve against the rigid enforcement of the contract. This is upon the general principle that a court of equity is a court of conscience, and will permit nothing to be done within its jurisdiction which is unconscionable. 2 *Story's Eq.*, §§ 1314, 1315, 1316, 1323; *Livingston v. Tompkins*, 4 *Johns. Ch.* 431.

But it is not therefore to be supposed that a court of equity will lightly dispense with contracts made between competent parties, and substitute other agreements more in accordance with variable rules of right and conscience.

Every presumption will be made in favor of such contracts, and they will be enforced according to the intention of the parties expressed and implied, unless it can be shown that thereby some hardship or wrong, not within the presumed contemplation of the parties at the time, will result from such enforcement.

In this case it was competent for the parties to make just such an agreement as they have made, and it is our duty to interpret it as they have made it. The covenants for certain improvements do not violate any rule of law; such covenants contained in deeds of conveyance prescribing the mode in which the premises shall be improved, in restraint of the use that shall be made of them, have been sustained where the restriction is confined within reasonable bounds, and the party in whose favor they are made, or those in privity with them, are interested in the subject matter of the restriction—*Whatman v. Gibson*, 9 *Sim.* 196; *Western v. MacDermot*, *Law Rep.* 1 *Eq. Cas.* 499; *S. C.*, 2 *Ch. App.* 72; *Mitchell v. Steward*, *Law Rep.* 1 *Eq. Cas.* 541; *Brewer v. Marshall*, 3 *C. E. Green* 337; *Barrow v. Richard*, 8 *Paige* 351.

Mr. Landis was the owner of a large tract of land, in the Vineland tract. For his own profit, and to illustrate some peculiar schemes of his own devising for the moral and social development of a colony settled upon his land, in which

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The methods of improvement and ornamentation seem to have entered, he put certain stipulations in his contracts for the sale of such land, and when the purchasers signed them they became bound thereby. His objects were lawful, and the result in building up a city, and bringing together a population of seven thousand persons in a short time, shows that he has planned well, and prospered in his undertaking.

In construing this agreement in the light of these circumstances, the Chancellor was undoubtedly right in holding that time is of the essence of this contract, both on account of its nature, or subject matter, and also by its express stipulations.

Time may be made of the essence of a contract by the express stipulations of the parties, or it may arise by implication, from the very nature of the property, or the avowed objects of the seller or the purchaser. When it thus appears, it will be considered essential in equity. 1 *Sug. on Ven. and Pur.* 433*; *Young v. Rathbone*, 1 *C. E. Green* 224; *Longworth v. Taylor*, 14 *Pet.* 172; *Hipwell v. Knight*, 1 *Younge & Coll., Eq. Ex.* 415; 1 *Story's Eq.*, § 776; 3 *Lead. Cas. in Eq.* 75; *Fry on Spec. Perf.*, § 710.

It was of great importance to Landis that actual settlers should buy, and that improvements should be promptly made as inducements to others to purchase and improve, and this intention is expressed in the agreement and in the times limited. The time for planting shade trees, "before the 1st day of May or November next following;" the erection of a habitation for the purpose of occupancy "within one year from the date hereof;" at least two and a half acres should be cultivated "each year from the date hereof;" these are all specified with particularity as to time, and the purpose is manifest.

It is further expressed, that in the event of the said S. K. Foster not complying with the above stipulations within the time specified, the said Landis *shall have the right to take back the said land by paying to the said S. K. Foster the*

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amount he has received on account of said purchase. This right to reclaim the property at the expiration of the time named for non-performance of these covenants, is decisive in determining the materiality of time in this case.

This construction being settled, the testimony in the case shows that there was a breach of these conditions on the part of the purchaser.

The shade trees were not planted until some time in the month of November, 1865, instead of before the first day; the house was not built until January 1st, 1866, instead of before September 4th, 1865; and none of the other improvements appear to have been made within the time specified. But Foster was in possession of the property under the agreement, and had made his payments at or very near the times stipulated, and such payments had been received by Landis. After the breach of these improvement stipulations, to wit, on the 31st of October, 1865, a further payment was made and received, and again on the 4th day of January, 1866, the balance of the purchase money was paid, received, and a receipt given in full. Before the last payment was made the dwelling-house had been built, costing about \$1000, two and a half acres of land had been cultivated, and trees had been planted upon the road in front of the lot. Before the deed was demanded, on the 13th of March, 1866, the underbrush had been cut in front of the property, and it had been plowed and seeded. It appears that some of the trees died, others had been planted, and that neither the trees nor the clearing and seeding are satisfactory to Mr. Landis. But there is no particular description given in the contract, and it does not sufficiently appear in the testimony that there has been bad faith, or a failure to comply substantially with these improvement stipulations. These are all important considerations upon the application to give effect to this contract by a specific performance.

After a careful review of the cases, I can find none where

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court of equity, under such circumstances, has refused to give relief.

In the case of *Benedict v. Lynch*, 1 *Johns. Ch.* 370, it was held that on default at the day, without any just excuse or any acquiescence or subsequent waiver by the other party, the court will not help the party in default. The purchaser had been in possession and made improvements, but made no payments and no tender of performance until two years after the appointed time. The learned annotators in 3 *Lead. Cas. in Eq.* 81, say, that while this case is generally admitted to be sound upon the point that time was of the essence of the contract, yet as the complainant had gone into possession of the premises, and built a house, which repelled the idea that the delay was due to an abandonment of the contract, or a design to speculate on the defendant, the decision would seem to be somewhat questionable on the latter point.

In the case of *Wells v. Smith*, 7 *Paige* 22, where it was held that the parties had made the payment at the day an essential part of the contract, and that the vendee, who had not attempted to build the house upon the lot, and who had, without a legal excuse, failed to make the payment at the time specified, was not entitled to a decree for a specific performance of the contract. Chancellor Walworth says: "If a vendee, after he had received the greater portion of the purchase money, should attempt to enforce a forfeiture of the money paid, under a stipulation that he might keep the whole amount thus received and the premises also if the last payment was not made on the day, I am not prepared to say that this court would not interfere to compel him either to accept the last payment and convey the premises, or to restore the purchase money already paid, after deducting a reasonable allowance for the use of the premises in the meantime."

Certainly there could be no difference, except the case would be stronger, if the result of the forfeiture were to confiscate valuable improvements made in the premises, in-

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stead of the purchase money. In a later case, *Edgerton* v. *Peckham*, 11 *Paige* 355, it was said by Vice Chancellor Gridley, in commenting on *Wells* v. *Smith*, "I cannot forbear remarking in this case, however highly I respect the opinion of the Vice Chancellor of the first circuit, (S. C., 2 *Edwards* 78,) that I considered it as adopting an exceedingly severe rule, and a case which upon the facts disclosed, entitled the complainant to relief." In the same case Chancellor Walworth says: "The case of *Wells* v. *Smith*, was entirely different from this. There the performance of the condition precedent on or before the particular day specified, *was essential to the vendor's security*," and "there was in fact no forfeiture except the loss of a profitable speculation."

Both of these cases, which show the extent to which courts of equity have gone in refusing relief, differ essentially in the very point of decision from this case now under consideration. Here everything had been done substantially, upon which the right to annul could be predicated, except the default as to time, and that had not been insisted upon, but the parties had proceeded after the breach. Even where time is of the essence of the contract, it may be waived by proceeding in the purchase after the time has elapsed. *Story's Eq.*, §§ 776, 1025 a.

In *Hipwell* v. *Knight*, 1 *You. & Coll. Eq. Ex.* 401, Baron Alderson, speaking in a case where time was the essence of the agreement, says: "The result of all the cases on this subject seems to be, that slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of such a stipulation, and that whenever a party has done any act inconsistent with the supposition that he continues to hold his opponent strictly to his part of the agreement, he is to be taken to have waived it altogether." See also *Seton* v. *Slade*, 7 *Ves.* 265, and notes; 3 *Lead. Cas. in Eq.* 49.

There are such inconsistent acts on the part of the vendor in this case.

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In the first place he has accepted two payments, the last in full of the balance of purchase money, after default in making improvements at the time fixed.

The acceptance of rent will defeat the right to proceed for a forfeiture previously committed. *Arnsby v. Woodward*, 6 B. & C. 519; *Bowser v. Colby*, 1 Hare 130.

Will not the acceptance of the purchase money after default in this case have the same effect? I can see no difference. This is not like the case of a continuing breach of covenant, which is not waived by the acceptance of rent, but it is the case of an actual and complete breach before the implied waiver, and is therefore conclusive. *Baker v. Jones*, 5 Ex. 498; *Camp v. Pulver*, 5 Barb. S. C. 91; *Clarke v. Cummings*, *Ibid.* 340.

It is no answer to say that Mr. Landis did not know that the improvements were not made when he accepted these payments after default. From the facts and circumstances of this case, his knowledge and oversight of the business of the Vineland tract, the exact system observed by him, and the agencies employed, he must be presumed to have known where equitable rights are in question. (2 *Lead. Cas. in Eq.* 163). He might have known, and he was bound to know, if he intended to insist upon the forfeiture. The purchaser had the right to suppose that he did know, and waived the default.

From Mr. Landis' testimony it appears that the purchaser might reasonably believe that he acquiesced in the delay, for he had been indulgent in other cases. He says: "When an honest disposition was manifested to make the improvements by the purchaser, I would sometimes allow the improvements to be made, and change the penalty mentioned in the contract." He had not, therefore, been exact in holding parties to compliance at the very day. But the trouble here was, that Foster had assigned to Grigg, without his, Landis' knowledge, and this had changed his usual course and disposition; of this I will speak hereafter.

In a case somewhat similar in facts, *Harris v. Troup*, 8

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Paige 423, it was said that it was inequitable, after the vendor had waived the forfeiture from time to time, by receiving portions of the purchase money long after the same were due and payable, to suddenly stop short and insist upon a forfeiture, without any previous intimation that he intended to do it.

Mr. Landis gave no intimation or notice that he intended to forfeit the contract because the improvements were not made at the time agreed upon. What would have been the practical effect if he had done so promptly? He could return all the purchase money he had received, and the parties would have been in *statu quo*. No loss would be incurred, except to the purchaser a probable speculation in the value of the lot bought. By neglecting to give such notice promptly, the purchaser has been permitted to build a house, and make other improvements amounting to one thousand dollars. To forfeit the property after this has been done, is to permit the vendor to take advantage of his own wrong, and add the amount of these improvements to his large wealth, and take it from the purchaser, who has acted upon the fair presumption from his silence, that he would not insist on the forfeit. This cannot be equitable. There are intervening equities which cannot be taken away under such circumstances.

It is said, however, that Grigg knew when he took the assignment of the contract, that the time for performance had passed, and therefore he took it with the risk of being ousted and losing his improvements. Suppose he did know of the default. He also knew that Mr Landis had given no intimation or notice of an intention to forfeit the contract, and upon this he had the right to act.

In *Hunter v. Daniel*, 4 *Hare* 420, where it was held that time was of the essence of the contract, it was said, that "each breach gave the defendant the right to rescind the contract, but that right should have been asserted the moment the breach occurred. The defendants were not at liberty to treat the agreement as still subsisting and to take

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the benefit of it at the expense of the plaintiffs. If they meant to insist it was at an end, they were at liberty to do so, but were not imperatively bound to do so. The defendants had no right to accept the money, but upon the principle that the agreement was still subsisting." And in *Monro v. Taylor*, 8 *Hare* 51, it was held that if time is to be considered of the essence of a contract, the point must be made promptly.

Such it appears to me is the import of the terms used in this contract: "In the event of the said S. K. Foster not complying with the above stipulations within the time specified, the said Landis to have the right to take back the said lands," &c. He has a right, the exercise of which is optional with him, and for his benefit. *Cartwright v. Gardner*, 5 *Cush.* 273. The time to evoke it is when the default occurs. To manifest his intention some act must be done, some notice given, because the agreement does not become void upon the happening of an event, or the expiration of a fixed time, but it is voidable upon the volition of the vendor expressed in a particular way, by the repayment of the money which he has received before the default. He has made no expression of this determination, but has been quiet, and permitted the condition of the opposite party, and of the property, to become changed; and has not only been quiet, but has done other acts by which he is precluded in equity from asserting his former right to annul the contract.

But it is evident that the points I have been considering are not those which have incited the respondent to the resistance of this claim for a conveyance. Neither the time that had elapsed, nor the delay or defects in the improvements, now set up, are so considerable as to induce him to refuse the deed. Had Foster remained the party to whom the conveyance was to be made, it is not probable that any default would have been insisted upon. The great point of objection is the assignment to Grigg, the appellant. He says: "Had I ever been aware of the assignment made

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by Foster to Grigg before the house was built, I would have forfeited the bond of agreement, and tendered the money before this improvement was made." "I gave the direction to send the check to Foster after I had learned that the assignment had been made by Mr. Foster to Mr. Grigg, certainly within five seconds; the moment that my book-keeper, Mr. John L. Burke, informed me of the attempted transfer."

It would thus appear that he resented the concealment by Grigg of his interest in the property, in representing himself as the agent of Foster, or permitting others to suppose that he was such agent, when he was really the assignee and principal in the contract after October 23d, 1865. It is not necessary to justify this conduct, or to attempt to excuse it. The facts do not explain it. He owned the adjoining property, and might wish to obtain this, but it was wrong to resort to any artifice to obtain it. But this is not a fraud, unless some fraudulent consequences be shown. It is immaterial, unless it appear that the alleged deception has in some way operated to the vendor's prejudice. *Fel-lows v. Gwydyr*, 1 *Russ. & My.* 83.

In some cases courts of equity will give effect to a collateral covenant by refusing to decree a specific performance of the principal contract in favor of the party who has obtained his interest in the contract in violation of a collateral covenant restraining an assignment. But it must be under special circumstances. *Flood v. Finlay*, 2 *Beall & Beatty* 9; *Nelthorpe v. Holgate*, 1 *Collyer* 204. In the latter case there was a secret understanding and assignment. But in a bill for specific performance the court held, that if the price was adequate, and it was not suggested that the vendor had refused, or would refuse, or could have obtained better terms of the assignee had he known the real circumstances, a decree should be made.

But I apprehend such collateral covenant will never be thus enforced, where it appears upon the face of the contract that the prohibition to assign is not the main purpose

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of the covenant, but a mere incident to and security for such purpose. It is the province of a court of equity to ascertain what is, in truth, the real intention of the parties, and to carry that into effect. What is the objection to making an assignment of the contract to Mr. Grigg, or any other person, as it appears on the face of the agreement? Not personal, surely. It was not even subject to the approval of the vendor; he reserved no such right. Nor was it merely arbitrary; that would be too unreasonable. But the object, as clearly expressed, was to protect the settlement against non-improving speculators; and it was for this purpose that no assignment could be made, until all the installments of the purchase money should be paid, and especially before the improvement stipulations were complied with. The assignee of this contract is not a non-improving speculator. He asks for a deed, not before, but after the improvements are substantially made, and the purchase money is paid. When these terms are fulfilled, a warrantee deed, in fee simple, clear of all encumbrance, was to be given to the purchaser by the terms of the contract. And why not to the assignee of such purchaser? The contract is assignable in equity, and the assignee has all the equitable rights of his assignor, unless restrained by the terms of this covenant. It would be inequitable to make the incident the principal point in the covenant. The main object is attained, as the party has himself expressed it, and the assignment, however it may stand in time between the assignor and assignee, has no effect claimed for it against the vendor, until his terms have been met and satisfied. The only omission is in the point of time, which we have shown above has been acquiesced in by his acts.

I know a different principal has been held in cases of forfeiture for a breach of a covenant not to assign a lease without license, and other collateral covenants relating to leasehold premises, in which no relief will be given; but the reason stated, that they admit of no adequate compensation, or clear estimate of damages, does not obtain in this case,

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where no more than nominal damages would be given. This stands upon another principle, that the restriction is in the nature of a mere security for the performance of the principal covenants, and such relief may be given by a court of equity as shall appear to be equitable under the circumstances of each particular case. 2 *Story's Eq.*, § 1324; *Reynolds v. Pitt*, 19 *Ves.* 134; 2 *Greenl. Cruise* 36, ¶ 29; *Skinner v. Dayton*, 2 *Johns. Ch.* 535; *Henry v. Tupper*, 29 *Vt.* 358; *Taylor's Land. and Ten.*, §§ 496, 500.

Other reasons which are technical and peculiar to covenants in leases, growing out of the relations of landlords and tenants, and assignees of terms, will be found by reference to Dumpor's case (2 *Coke* 119), and notes in 1 *Smith's Lead. Cas.* 85.

It is evident from the immediate effort of the vendor to rescind the contract when informed of the assignment, that he supposed it was forfeited by any transfer before the improvements were made; but there is no clause of forfeiture, or re-entry for condition broken in the agreement. Certainly this court will not interpolate a forfeiture. Where there is no clause of avoidance or of re-entry, a breach of the covenant will not work a forfeiture or determination of an interest in lands. *Willson v. Phillips*, 2 *Bing.* 18; *Bockover v. Post*, 1 *Dutcher* 286; *Taylor's Land. and Ten.*, § 412; *Adams on Eject.* 157.

The usual and proper remedy for such breach is an action for damages, not an eviction. In the interpretation of words used in a contract or deed, the leaning of courts against forfeitures always inclines them to call them a covenant rather than a condition, where the remedy can be attained by such construction. *Aiken v. Albany R. R.*, 26 *Barb.* 289. But the restriction upon alienation, whether it be called a covenant or a condition, did not exist after the installments of the purchase money had been paid and the improvements essentially made, and there is no difficulty in giving it the assignment effect between all the parties at that time, and affording relief to the appellant.

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Mr. Landis gets his purchase money and the incidental advantages of the improvements in the lands sold, which were stipulated for in his contract; and the purchaser holds his land and the amount expended upon it, in the shape of improvements. This appears to be equitable between the parties. Any other determination would lead to serious loss and injury to the appellant. It is true that Mr. Landis has offered very fairly in his answer, to make any just compensation to the appellant, for the expenditures and improvements, if the court should be of the opinion that he has any equitable claim on him for the same; but if his position be correct, he is under no legal obligation to make such payment, nor has this court the right to impose such terms upon him.

Considering all the circumstances of this case, as above stated, my opinion is that the appellant is entitled to the relief prayed for in his bill, and a specific performance of said contract, and that the decree of the Chancellor dismissing his bill of complaint should be reversed, with costs on appeal and costs below.

DALRIMPLE, J., dissenting.

This bill is filed to compel the specific performance by Landis, the defendant, of his contract made with one S. K. Foster, to convey certain lands to Foster. A bill for specific performance of a contract invokes the extraordinary jurisdiction of the court, and the relief rests in sound discretion. *Gariss v. Gariss*, 1 C. E. Green 82. The complainant founds his right to a decree, not upon any contract made by the defendant with him; his rights, if any he has, are as assignee of the defendant's contract with Foster. That contract bears date the 1st day of September, 1864. The defendant agreed to sell, for the consideration of \$420, which Foster agreed to pay in certain installments, within a period of three years from the date of the contract. Foster further agreed to make certain improvements "*within one*

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year from the date" of the contract, and in the event of his not complying with said stipulations for improvement "*within the time specified*," the defendant was to have the right to take back the land by repaying the amount he had received on account of the purchase. The contract further expressly provides that Foster was not to have the right to assign said land, or any part thereof, before the improvement stipulations were complied with, unless, in case of failure or inability to make said improvements, Landis should *decline* to take the purchase back by refunding the money he had received upon the same. The object of these stipulations was declared to be to secure the general improvement of the settlement and to protect the same against the speculations of non-improving people upon those who improve their lands. Foster, having wholly disregarded and neglected to fulfill his stipulations for improvements, on the 23d day of October, 1865, without the knowledge or consent of Landis, assigned the contract to the complainant.

The question which here arises is, whether all rights of Foster under the agreement had not, at the time of the assignment, ceased by reason of his neglect to make the improvements according to his covenants in that behalf. The complainant's contention is, that under this contract the vendee lost no rights by reason of not having made the improvements within the time limited; that time not being to the essence of this contract, it would be inequitable and unjust to allow a forfeiture of the vendee's rights because of his failure or neglect to make the improvements within the year.

The law relating to this subject is comprised in the following extract from the opinion of the court, delivered by Justice Story, in *Taylor v. Longworth*, 14 Pet. 174: "There is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulations of the parties, or may arise by implication from the very nature of the property or the avowed objects of the seller or the purchaser. And even where time is not thus either expressly or impliedly of the essence of the contract,

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if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period, been a material change of circumstances affecting the rights, interests, or obligations of the parties, in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust. But except under circumstances of this sort, or of an analogous nature, time is not treated by courts of equity as of the essence of the contract, and relief will be decreed to the party who seeks it, if he has not been grossly negligent and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases the court expects the party to make out a case free from all doubt, and to show that the relief which he asks is, under all the circumstances, equitable, and to account in a reasonable manner for his delay and apparent omission of duty." To the same effect is the case of *Baldwin v. Van Vorst*, 2 Stockt. 585.

It seems to me quite plain upon the face of this contract that time is material. It is of the essence of this contract, both by express stipulation and from the avowed object of the letter, which was to promote the speedy settlement and improvement of the colony. No excuse for the vendee's default has been so much as suggested. It is not shown that it arose from mistake, accident, want of ability, or even inattention. For anything that appears before us to the contrary, it may have been willful and with design to embarrass the defendant. Under these circumstances, I cannot see on what ground Foster would be entitled to the interposition of a court of equity to save him from the consequences of his breach of covenant. But it is said that the defendant, prior to the assignment to the complainant, waived the forfeiture. The year within which the improvements were to have been made, expired on the 1st day of September, 1865. Fifty-two days thereafter the assignment was made, without anything having been done by the

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defendant in the meantime. It does not appear that between the expiration of the year next after the date of the contract, and the day of the assignment of it, there was any communication or intercourse, directly or indirectly, between Foster, who resided in Massachusetts, and Landis, who resided in this state; nor that Landis knew, or had reason to believe, the improvements stipulated for had not been made. In my opinion, the vendor did not, by a silence short of eight weeks, waive his legal rights; nor do I think the clause in the contract, giving the vendor the right to take back the land on repayment of the purchase money received, in the event of Foster not complying with the improvement stipulations, in any wise affects the rights of the parties. The improvements not having been made according to contract, the vendor had the right, within a reasonable time, to demand a rescission of the contract, and a reconveyance or release of the property. A mere delay of a few days in making this demand did not work a forfeiture of this right. I cannot, therefore, escape the conclusion, that at the date of the assignment Foster's rights under the contract had ceased, as well in equity as at law, and consequently he had no estate or interest, legal or equitable, which could pass under the assignment.

But assuming that the Court of Chancery could, at the date of the assignment, under the circumstances above stated, according to established principles of equity, have interfered and saved Foster from the legal consequences of his breach of covenant, the next question which is to be settled is whether he had the right to assign his equitable estate to the complainant, so that the complainant can avail himself of the assignment in a court of equity. The vendor, by the terms of the contract, is restrained from making an assignment of it before the improvements are made, unless the vendee should decline to take the purchase back. To decline in the sense in which the term is here used, means to refuse by some decisive act of omission or commission. It would be a forced and unwarranted construction of the

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contract to hold that the defendant was bound to seek the vendee immediately upon the expiration of the year, and tender the money received on the contract, or be held to have declined to take back the purchase. This is not one of that class of cases in which it is held that a mere omission to perform an act which the party is bound by law, on his agreement, to do, will amount to a refusal. I am not willing to admit the doctrine that a complainant can place his right to recover in a court of equity, upon an assignment made in violation of the plain terms of the contract assigned. To state the case in the simplest form, the complainant here bases his right to relief upon a legal wrong. I have not been able to find any head of equity under which such a title to relief may properly be placed. The complainant asks us to save him a forfeiture. The difficulties in his way are that he does not come into court with clean hands, and has never acquired, as against the defendant, any rights. It appears to me that in order to sustain the complainant's case, we must hold that a contract not to assign is in equity utterly futile, and that it may as soon as made be violated with impunity.

It is not necessary now to determine to what, if any, relief Foster would be entitled, upon the ground that his assignment is a nullity, if he were here seeking aid; it is sufficient for the purposes of this case to say that as between this complainant and the defendant, there is neither privity of estate nor contract.

It was insisted that this covenant, being in restraint of alienation, is void. No case was cited which supports that proposition. A covenant by the vendee, in an agreement for the sale of lands, not to assign his interest in the contract before the stipulations on his part are performed, is not void because in restraint of alienation of real estate, nor is it in contravention of any rule of law or of public policy. The power of alienation is incident to an estate in fee simple, and a condition in the deed wholly preventing the exercise of this power is held to be void, because repugnant to the estate

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granted. 1 *Wash. on Real Prop.*, p. 54, § 45; 4 *Kent.* 131; 21 *Pick.* 42.

A contract for the sale of real property creates no estate at law, and at the common law was not assignable, so that the assignee could maintain an action at law thereon in his own name.

It is insisted that the defendant, subsequent to the assignment, recognized the contract as in existence, and thereby waived all previous forfeitures and breaches of covenant. It is true that the defendant on the 31st October, eight days after the assignment, received a payment of \$18.68, and on the 4th day of January next following, a further payment of \$34.19, from the complainant; these two payments being in full of the last installment due on the contract; and there is evidence tending to show that some time in the succeeding February or March, the clerks or agents in the defendant's office, expressed a willingness to make a deed, in case the improvements had been made according to agreement, and the complainant has produced evidence which he claims shows that the improvements were made by him within a short time after the assignment. But the fact of the assignment was carefully concealed from the defendant. The complainant made the payments and took the receipts therefor in the name of the vendee, and having suppressed the truth, cannot claim, with any show of justice, the benefit of a recognition of the contract by the defendant, who did not know, and had no reason to believe, that the complainant claimed to occupy the position of assignee. I cannot see how the defendant could recognize the complainant as assignee, until he knew or had reason to believe the complainant had or claimed to have an assignment, nor how there could be a recognition or ratification of the assignment by the defendant, unless he had some knowledge, information, or belief that there was an assignment in existence. I think the defendant had a right to know with whom he was dealing, and who claimed to have the interest in the contract, and that it would be unjust to allow the complainant

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to bind the defendant to a recognition of a forfeited agreement, or sanction of a void assignment, by acts done before the defendant knew the true state of affairs. The conduct of the defendant might have been quite different if the truth had not been concealed from him. The complainant's attempt to prove that the defendant or his agents agreed to make a deed to the complainant, is a failure; on the contrary, it appears that as soon as the defendant was advised of the truth of the case, he tendered the purchase money back to Foster, and declined to recognize the complainant as having any interest in the contract. Nor do I see that the claim of the complainant is strengthened by the fact that he made improvements on the property soon after he purchased it. Though he made these improvements with very considerable haste, and immediately after his first payment of \$18.68, I am not satisfied from the evidence that he did so in good faith. However this may be, there is no fact or circumstance going to show that the defendant or his agents advised, encouraged, or assented to them, except, it may be, in respect to a very inconsiderable part, made by the complainant before he had disclosed his true position, and while the defendant was under the belief that the complainant was acting on behalf of Foster. If the defendant knew that the improvements were being made, he must have been under the impression that they were the work of his vendee, and not of a stranger. If it be asked if the complainant must lose his improvements, I answer that he occupies the position of one who has improved land without the knowledge, assent, or request of the owner. I know of no power which a court of equity has to give the land of the defendant to the complainant, in order that the latter may secure improvements which he had no right to make.

Though this matter of improvements, under the circumstances, does not change the legal aspects of the case, it may not be amiss to remark that the defendant voluntarily proffers himself, in his answer, as willing to make any just

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compensation for the improvements, that to the Chancellor shall seem equitable and just. The complainant, instead of accepting this offer, continued the litigation, and failed in the court below. I think the decision of that court dismissing the bill was right, and should be affirmed.

The decree was reversed by the following vote :

For reversal—BEASLEY, C. J., BEDLE, CLEMENT, DEPUY, KENNEDY, SCUDDER, VAIL, VAN SYCKEL, WALES. 9.

For affirmance—DALRIMPLE, OGDEN, OLDEN, WOODHULL. 4.

CHEW, appellant, and BRUMAGIM, respondent.

1. A judgment recovered in the state of New York must receive the same effect to which it is entitled there.

2. Under section 111 of the New York code, a person who assigns a bond as collateral security is a necessary party to a suit brought by his assignee against the obligor of the bond.

3. On foreclosure here of the mortgage given to secure the bond complainant, who holds it absolutely by assignment subsequent to collateral assignment, is entitled to a decree for the amount due upon excess of the judgment in New York.

The opinion of the Chancellor is reported in 4 C. E. Green 130.

Mr. A. V. Schenck and Mr. E. P. Cowles (of New York), for appellant.

Mr. E. T. Green and Mr. Williamson, for respondent.

MARCH TERM, 1870.

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The opinion of the Court was delivered by

VAN SYCKEL, J.

The facts of this case are concisely stated in the opinion of the Chancellor, as follows :

“ Robert Chew, in 1851, gave to Peter Walker his bond, secured by mortgage on lands in this state, for the payment of \$3500 in March, 1856, with interest half yearly. Walker, in December, 1851, assigned the bond and mortgage to Stephen G. Wood, as collateral security for the payment of \$1700, and afterwards further assigned them as collateral security for the sum of \$200. In April, 1853, Wood brought suit on the bond against Chew, in the Supreme Court of New York, joining Walker as defendant, he having refused to join as plaintiff; Chew appeared and pleaded; Walker was not served with process, nor did he appear or plead; a rule was ordered after his death, which occurred during the suit, making his administratrix in New York, a party in his place; but she was not served with the rule or with process, and did not appear or plead, nor was she in any way brought into court. Chew pleaded fraud in the consideration of the bond, and claimed to recoup the damages and loss to him arising from the fraud, which consisted in false representations as to property sold to him, for which the bond was given as payment. An issue was joined between Wood and Chew on this question of fraud, and upon a trial had on this issue, the jury found for Wood the sum of \$2091.25, for which judgment was given, which Chew immediately paid. In this issue and trial, the administratrix of Walker took no part.

“ Pending the suit, in December, 1857, Wood assigned the bond and mortgage to M. F. Braisted; and on the 9th of April, 1859, three days after the judgment in the Supreme Court, and two days after the payment of it, Braisted and Walker's administratrix assigned the bond and mortgage to Brumagim, the complainant.”

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Brumagim filed his bill in this state to foreclose the said mortgage, and the defendant insists that the judgment in New York extinguished the bond, and that, by the payment of that judgment, the debt secured by the mortgage was satisfied, and the mortgage thereby discharged.

The question turns upon the effect of that judgment in New York, it being admitted that it is entitled to the same effect here that is given to it by the laws of that state.

Two questions are raised in the discussion of this case :

1. Whether Walker was a necessary party to the suit instituted by Wood in New York? 2. If a necessary, was he an actual party to that suit?

The first question involves the construction of section 111 of the New York code, which is in these words: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113." Section 113 provides that an executor, administrator, or trustee of an express trust, or a person expressly authorized by statute may sue without joining the person for whose benefit the suit is prosecuted.

Who are the real parties in interest within the meaning of section 111? If Walker was a necessary party to the suit in New York, it is conceded that the judgment in that case cannot, unless he was an actual party, bind him or those claiming under him. Wood was interested in the bond to the extent of his loan to Walker, and Walker owned the residue. The words of the code, in their ordinary acceptance, would clearly include both parties, and Walker is interested to a greater extent than Wood, for his liability to Wood remains, whether the collateral can be enforced or not, while Wood looked to the bond only in the event of Walker's default.

Was the code intended simply to effect a change in the rule of the common law, that a chose in action was not assignable so as to enable the assignee to sue thereon in his own name? Was it designed merely to make the assignment, in the words of our own statute, good and effectual

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in the law, and to clothe the legal title with the right to sue? If this purpose existed, it would have been fully effectuated without the exception in section 113. If the absolute legal title, without the beneficial interest, can sustain the action, the exception in section 113 in favor of executors and trustees, was wholly unnecessary, and section 111 would have precisely the same import, with the exception expunged. Executors have the legal title but not the beneficial interest, and the framers of the code must have understood that, by the term 'real party in interest,' they excluded those who had the legal, but not the beneficial interest. It would be clearly in violation of a well settled rule of statutory construction, to take out of the operation of this section, persons who are not of the class expressly excepted by its terms, or to adopt a rule which gives to the exception no purpose whatever.

A reference to other provisions of the code in connection with section 111, establishing a procedure before unknown to courts of common law, will show a marked intention in its framers to assimilate the practice in courts of law with respect to parties, to that which had pertained in equity. Section 117 enacts, that all persons having an interest in the subject matter of the action may be joined as plaintiffs, with certain exceptions. Section 118. that any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the questions involved therein. Section 119, that those united in interest must be joined as plaintiffs or defendants, unless a party refuse to join as plaintiff, and then he is to be made defendant. Section 122, that the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or saving their rights; but when that cannot be done the court shall order them brought in. And section 144, that the defendant may demur for defect of parties.

It will be observed that these rules apply as well to cases on the equity as the law side of the court. The term 'real

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party in interest,' was well understood in equity to mean the beneficial interest; the party entitled to the fruits when gathered.

The commissioners of the code, in reporting these provisions which were afterwards adopted, say (Title 3, p. 123,) that the purpose they had in view was: First. To do away with the artificial distinctions existing in courts of law, and to require the real party in interest to appear in court as such. Second. To require the presence of such parties as are necessary to make an end of the controversy. If the view now taken prevails, they have accomplished their purpose; otherwise, not.

Giving the words 'the real party in interest,' the signification they had in equity, concludes this controversy.

It is the undoubted rule in New York that upon foreclosure of a mortgage, the assignor who has assigned as collateral security, is a necessary party, even though the assignment is absolute in its terms and expresses payment of a full consideration. *Whitney v. McKinney*, 7 *Johns. Ch.* 145; *Kettle v. Van Dyck*, 1 *Sandf. Ch.* 76. Therefore, the interpretation now given to section 111 must be the true one, unless the code was designed to effect a radical change in the rule in equity; an intention nowhere intimated, either in the code itself, in the history of its adoption, or in any subsequent adjudication.

The New York cases show that in actions at law *ex contractu*, under the code, a distinction has been drawn between proper parties and necessary parties in cases where, at common law, such distinction was never known, and this departure from the common law can be entertained, only because it is understood that the rule in equity as to parties has been engrafted upon its procedure.

Section 111 is imperative in its provisions, bringing within its operation all who are comprehended in the description, 'real party in interest,' excepting those expressly excluded by section 113; therefore, the institution of the suit by one

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of several parties in interest will not satisfy its requirement ; all must be joined. This section declares who shall prosecute an action, and who shall be plaintiff is made to depend, not upon the nature of the defence which may be set up, but upon the character of the interest which the plaintiff has.

The code allows defences, either legal or equitable, to be set up in a suit at law in all cases, and thus every defence is made a legal defence, a defence that will prevail in a suit at law.

The fact whether Walker was really interested in the bond, or the extent of his interest, must be determined by the contract he made with Wood, not by the circumstance that the obligee may chose to allege fraud in the consideration of his bond, which was not an admissible defence before the code to an action at law on a sealed instrument.

This view, however clear it may be to my own mind, must be yielded, if it is in conflict with the adjudicated cases in New York ; whatever construction the courts have adopted there, should conclude us here.

In *Lewando v. Dunham*, 1 *Hilton* 114, the plaintiff had an absolute assignment of the claim under seal : it appeared in evidence that the assignor was entitled to half the amount to be recovered. The court held that suit would not lie by the assignee alone, thus clearly holding that the absolute legal title, coupled with a partial interest, will not sustain a suit.

In *Cummings v. Morris*, 25 *N. Y. R.* 625, the notes sued upon were passed to the plaintiff under an agreement to give the assignor, when the notes were collected, the amount thereof in stock of the Evergreen Cemetery Company. The court properly held that the assignee could sue alone ; the assignor had no interest whatever in the proceeds of the notes when collected ; he had simply a claim against the assignee for the stock agreed to be furnished. In this case, as previously reported in 3 *Bosworth* 572, the court say that a party, who has an absolute right to the money, to

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appropriate it to his own use when recovered, is the real party in interest, under section 111, and that in this case the plaintiff had the legal and equitable title. It is evident from the language used by the court, that if the assignor had been entitled to any part of the money when collected, he would have been held to be a necessary party.

Considerant v. Brisbane, 22 N. Y. R. 389, is a leading case on this subject. The suit was brought by Considerant, upon a promissory note drawn by Brisbane, payable to Considerant, as executive agent of the company, Bureau, Guillon, Godin & Co. Judge Wright, in delivering the opinion of the court, held that although, prior to the code, Considerant could alone have maintained the action, because he had the absolute legal title, yet, under section 111, he was not the real party in interest, the beneficial interest being the sole test of the right to sue. But in this case, the plaintiff's right to sue was sustained, upon the ground that he was trustee of an express trust. In this opinion Justices Selden, Davies, Clerke, and Welles, concurred. Judge Denio, in a dissenting opinion concurred in by Chief Justice Comstock and Judge Bacon, says, that the code, though adopting as a general rule, the practice prevailing in courts of equity, by which the parties having the beneficial interest were required to be brought before the court, made an exception in favor of trustees of express trusts, and dissents from the majority opinion, only in holding that the principals named in the note must be regarded as the promisees, and the suit must be in their name.

In this case decided in 1860, the eight judges of the Court of Appeals, united in holding that the code had adopted the practice prevailing in equity, by which the parties having the beneficial interest must be before the court and that the beneficial, not the legal interest, was the sole test of the right to sue.

In the *Western Bank v. Sherwood*, 29 Barb. 389, the suit was by the assignee, to whom the bond had been assigned as collateral security, to which the defence set up was v

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of consideration. Judge Marvin in his opinion says, that when a complete determination of the controversy cannot be had without the presence of other parties, they must be brought in, and that the judgment rendered in the court below, would not determine the controversy between the defendant and Johnson, the plaintiff's assignor, who was not a party.

Boynton v. The Clinton and Essex Mutual Insurance Company, 16 Barb. 254, was a suit by assignor and assignee as plaintiffs, on a policy of insurance assigned as collateral. The court held that although by the terms of the policy, nothing could be recovered on it in excess of the amount due from assignor to assignee, the assignor was properly joined with him as plaintiff in the suit, because he was a party in interest, as payment of the loss to that extent, would discharge his debt to the assignee.

Secor v. Keller, 4 Duer 416, is equally in point, where it was held that a dormant partner in a suit by his copartners, was a necessary party under section 111. The court uses this unmistakable language: "Before the code, in an action at law, a dormant partner was not a necessary party, but in equity, every partner, active or dormant, having an interest in the controversy, was a necessary party, and we agree with the referee, that the code has adopted the rule which prevailed in equity, and made it universal. The provision of section 111 is imperative, and subject to no exception other than those stated in section 113."

It will be found, upon a critical examination of the cases in which a suit has been maintained by one not having the entire beneficial interest, that he has been treated as trustee of an express trust.

The case of *St. John v. The American Life Insurance Company*, was mainly relied upon by defendant's counsel. The plaintiff sued upon two policies of insurance, which had been assigned to him under an agreement that if the policy, number 2500, should be paid to him, he would pay \$1500 of the proceeds to the assignor's wife, and pay to her all he

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recovered on the other policy. The point was made, that the assignor was a necessary party; the Court of Appeals held otherwise, without stating the ground upon which they rested their decision. There was no doubt about the right of the plaintiff to sustain his action; he was a trustee of an express trust. So in the case of *Nelson v. Easton*, 26 N. Y. R. 416, the plaintiff was held to be the trustee of an express trust.

Grant v. Tallman et al., 20 N. Y. R. 191, was an action to foreclose a mortgage by the party to whom it was assigned as collateral. The court say that the assignee was the legal owner of the securities, and the proper party to sue, and that the action might be continued in his name even though the assignor had paid the debt for which he held the mortgage as security. It does not clearly appear, but it would seem from the names of the parties at the head of the case, "*Grant v. Tallman et al.*," and the statement in the case that the defendants, Tallman and wife, alone resisted the foreclosure, that the assignor was a party to the suit, and if that was so, all parties in interest were before the court.

These cases are in full accord with what I understand to be the correct interpretation of the code, and therefore Walker was a necessary party to the suit on the bond, unless by virtue of the assignment to him he became the trustee of an express trust. By the assignment, Wood did not become a trustee for Walker; Walker's right was strictly an equity, a right to redeem by paying his debt. If Wood had collected an amount in excess of his claim, a trust would have resulted, but until that contingency happened he was in no sense a trustee of an express trust for Walker. In reaching this conclusion the amendment to section 113, in 1851, has not been overlooked.

Walker having been a necessary party, the record produced must answer whether he was an actual party.

In New York a person who is not served with process, or does not appear, unless he is a joint contractor with the party served, or appearing, is not deemed a party to the

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suit, and cannot be affected by the judgment, although he is named as a party in the summons or process. *New York Code* § 136; *Robinson v. Frost*, 14 *Barb.* 536; *Howard v. Finch*, 5 *Duer* 666; *Norton v. Hayes*, 4 *Denio* 245; *East River Bank v. Cutting*, 1 *Bosw.* 536.

The complaint does not aver, nor does the record in any way show, as the code requires that it should, that Walker was either summoned, or voluntarily in court. A record made up according to the course of proceeding at common law sets out the declaration, which avers that the defendant is in custody, or that he was summoned or attached to answer, or present in court in his own proper person, and in such case the record would be *prima facie*, if not conclusive against the defendant, in the absence of any statutory provision. *Price v. Ward*, 1 *Dutcher* 225. The judgment in New York therefore has not the virtue which is claimed for it, and the defendant is without defence, except as to the amount which was paid to Wood upon the bond.

The code clearly defines the mode of proceeding in a case like the one under consideration. If Walker refused to join in the suit as plaintiff, that fact being stated in the complaint authorized Wood to make him a defendant. Wood having failed to bring Walker in, Chew, under section 144 of the code, should have demurred for want of proper parties, and thus have secured an adjudication that would have fully protected him. The further prosecution, to which Chew is subjected, results from his own neglect.

The decree of the Chancellor must be affirmed.

For affirmance—BEDLE, DALRIMPLE, DEPUE, OGDEN, OLDEN, SCUDDER, VAN SYCKLE, WALES, WOODHULL. 9.

For reversal—KENNEDY.

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THE NATIONAL BANK OF THE METROPOLIS and others, appellants, vs. SPRAGUE and others, respondents.

1. In strict practice, a complainant is put to his supplemental bill, and a defendant to his own cross-bill, to raise a defence, arising *pendente lite*, affecting a co-defendant.

2. When a party is brought into equity, he is entitled to an equitable decree according to his case as it then exists.

3. A chattel mortgage duly filed does not, by want of refileing, lose its priority over a subsequent one taken before the time for refileing arrives.

4. If a chattel mortgage is filed, or possession is taken under it before a subsequent mortgage is given, it maintains its priority.

5. Insolvency defined.

6. A mortgage given by an insolvent firm to trustees to secure bonds, which the debtors subsequently passed to their creditors, declared to be void under the second section of the statute of frauds, and within the rule in *Owen v. Arris*, 2 *Dutcher* 23.

7. But it is void only as to those creditors who have raised the issue by their pleadings.

8. The right of the insolvents to pass the bonds to their individual creditors not assented to.

Before this cause came to hearing, the appeal of the bank was settled, and the argument had upon the other appeals. The opinion of the Chancellor is reported in 5 *C. E. Green* 23.

Mr. Williamson and *Mr. C. Parker*, for Klous and Hillburn. *Mr. Gilchrist*, Attorney-General, for Woolman Stokes. *Mr. W. H. Vredenburgh*, for Elisha Woolley.

The opinion of the court was delivered by

VAN SYCKEL, J.

This is a strife for priority between the creditors of Sprague and Stokes. The statement following will disclose the facts applicable to the questions discussed on the appeal:

C. C. Sprague and Howard A. Stokes, by written contract bearing date September 7th, 1865, had stipulated to pur-

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chase of Woolman Stokes, the Continental Hotel property at Long Branch, on certain terms therein specified. On the 27th day of March, 1866, Woolman Stokes conveyed the property to Howard A. Stokes, and Lydia J. Sprague, the wife of C. C. Sprague, subject to a mortgage of \$15,500, then existing on the premises, and the vendees executed a mortgage of the same date to Woolman Stokes, to secure \$29,500 of the purchase price, which was duly recorded.

Thereafter the following mortgages were executed by them on the real estate: To Klous and Hillburn, May 18th, 1866, for \$35,000. To A. V. Conover, November 2d, 1866, \$1020.10; and the following chattel mortgages: To Klous and Hillburn, May 24th, 1866, for \$30,000. To Woolman Stokes, November 2d, 1866, for \$12,000; and a mortgage covering both the lands and chattels, to Allen and Mitchell, trustees, acknowledged October 8th, 1866, securing the payment of one hundred bonds of \$1000 each, payable in three years to blank or bearer.

November 30th, 1866, the Bank of the Metropolis recovered their judgment in the Supreme Court of this state against C. C. Sprague, for the sum of \$65,892.80, and thereupon filed their bill as hereinafter set forth.

The first question submitted is, whether the chattel mortgage of Klous and Hillburn, for \$30,000, which will be called the Klous mortgage, must be displaced, because it was not re-filed between the 20th of June and the 21st day of July, 1867?

Woolman Stokes, who holds a subsequent chattel mortgage, claims now to be preferred by reason of the default of Klous and Hillburn in re-filing their mortgage within the time required by law. The Klous mortgage is dated May 24th, 1866; was filed July 20th, 1866, and re-filed May 10th, 1867. The Woolman Stokes mortgage is dated November 2d, 1866; filed November 7th, 1866, and re-filed October 10th, 1867.

Prior to June 20th, 1867, while the Klous chattel mortgage was a perfect security in the order of priority in which

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it originally stood, the following facts mark the history of this case :

The Bank of the Metropolis, on the 6th of November, 1866, filed their original bill, and on the 20th of March, 1867, their supplemental bill, to which Sprague and Stokes, Klous and Hillburn, Woolman Stokes, and the trustees above named were made defendants, setting up, among other things, that the trustee mortgage was intended to delay and hinder creditors, and therefore void ; and that a less amount was due to Klous and Hilburn, and Woolman Stokes, than appeared on the face of their respective mortgages, and praying that they might be enjoined from proceeding at law upon their mortgages ; that upon an account being taken of the amount actually due, the complainants might be permitted to redeem those securities, and be subrogated to the rights of the mortgagees, and that the trustee mortgage might be declared to be void. March 29th, 1867, Klous and Hillburn filed their bill to foreclose their mortgage on the real estate. April 2d, 1867, the trustees and Woolman Stokes, filed their joint bill to foreclose the trustee mortgage, and Woolman Stokes' chattel mortgage, making Sprague and Stokes, the National Bank of the Metropolis, A. V. Conover, and sundry judgment creditors, defendants thereto, and setting forth the execution of the Klous chattel mortgage, the amount, date and time of filing thereof, without in anywise questioning its *bona fides* or validity, and without making Klous and Hillburn parties to their bill, although process was served upon them, and they subsequently filed an answer thereto insisting upon their priority.

To the first bill Klous and Hillburn filed their answer insisting upon, and the trustees and Woolman Stokes filed their separate answers, admitting the *bona fides* and priority of the Klous mortgage. If the case had remained in this condition, Klous and Hillburn would have been secure in their position. In the first bill no issue was made which could affect them, except as to the amount actually due on their security. In the second bill no reference was made to their

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chattel mortgage, and in the third bill, it was not questioned or attacked, either in the bill, or by any answer thereto. In neither or all of those cases combined therefore, could a decree have been made depriving the Klous mortgage of its original place. The disturbing element was introduced by the filing of the fourth bill, on the 13th of September, 1867, by Klous and Hillburn, to foreclose this chattel mortgage. In the answer of Woolman Stokes to this bill, the defence to the Klous mortgage first appears, and there is no doubt that if this had been the only bill filed in the cause, the questions raised by the answer would have been properly before the court. This bill did not even preserve its detached form, there is no decree under it as a distinct cause, its progress having been arrested by the order of the Chancellor, made and filed on the 10th day of March, 1868, consolidating the four suits, and directing that the three bills last filed be treated as cross-bills to the first in order of time.

Without intending to make the case turn upon this point of practice, it is not conceded that in the suit as so consolidated, the defence now insisted upon to the Klous mortgage can be entertained. It is questionable, whether the bill last filed can be used as a cross-bill for any such purpose. It did not claim any discovery in aid of Klous and Hillburn's defence to the original bill, nor did it seek any decree against a co-defendant, which it was not within the power of the court to grant in the original suit. As a cross-bill, therefore, in aid of any relief to which Klous and Hillburn were entitled, it was entirely unnecessary, and should have been dismissed, even if filed originally as a cross-bill. If this was in the way of an equitable result, the court could hold to the strict practice, which puts a complainant to his supplemental bill, and a defendant to his own cross-bill, to raise a defence, arising *pendente lite*, affecting a co-defendant. It is true that a departure from the earlier practice enables a defendant, without cross-bill, to attack a co-defendant; but the rule has never been so far relaxed as

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to permit matter happening after the institution of the suit to be put in evidence without a supplemental or cross bill.

But admitting that the defences raised by Woolman Stokes may be considered, are they available for the purpose for which they are offered? The claim of Klous and Hillburn is neither deferred nor affected, if re-filing was unnecessary, or if possession within the terms of the chattel mortgage act was taken by them. This raises three questions. First: Whether in the position these parties occupied on the 20th of June, 1867, re-filing was at all essential? Secondly: Whether in any case, failure to re-file advances the subsequent mortgage taken before the default occurs? Thirdly: Whether the possession taken by Klous and Hillburn was such as the act requires?

When the first bill was filed and these defendants were brought into court, equity assumed control over their security, and the subjects embraced in it, and these defendants thereby became entitled to an equitable decree according to the case as it then existed. The court having taken the control of a lien, then perfect at law, had full power without any aid from a court of law, or any further act of the holder, to preserve and enforce his rights. Not only was such interference by the mortgagees unnecessary, but if attempted, it would have subjected the actor to injunction process.

The rights of all the parties were fixed before the time for re-filing had arrived, and if it was necessary to re-file at all, that necessity would follow the mortgage pending the entire litigation. If prior to July 20th, 1867, the mortgaged chattels had, by order of the Chancellor, been converted into money, or a receiver put into possession of them, it would not be seriously insisted that any action was necessary on the part of these defendants, for they could not in either case take possession, and having by the statute an election to do either of two things, they cannot be restricted to one. The possession taken under the order of the court would enure to the benefit of those entitled to the avails of

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the goods, and in equity it can make no difference, whether such conversion was made, or actual possession taken, at an earlier or later period; it was subject to be done at any time, without the option of Klous and Hillburn, and therefore, in contemplation of equity, the fund must be considered as in court for equitable distribution, from the time jurisdiction of the parties and subject matter attached. If this is not so, it would be necessary for the claimants, whose claims are filed under the mechanics' lien law, in order to preserve the vitality of their liens, to pursue their remedy at law, by issuing summons thereon within the prescribed time, after they have been brought into a court of equity; and a junior judgment creditor, after admitting in his answer the priority of an older judgment, might gain precedence over it by issuing an execution at law. The result would be, that equity would not be able, unassisted, to give the relief to which a party is indisputably entitled when its aid is invoked, but must, from time to time, send the parties before it to a court of law, or remit them to their own action, to maintain their standing in its tribunals. That a court of equity exercises a power so imperfect and inadequate, has never been supposed. If the court is so feeble in its power, the injunction issued the 7th of November, 1866, should have been dissolved, and these defendants let free to take care of themselves.

Unless this view prevails, the doctrine of *lis pendens* would be subverted, for it is well settled that a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice, in point of fact, affects the purchaser in the same manner as if he had such notice, and he will be bound by the judgment or decree in the suit. 1 *Story's Eq.*, § 405.

The third section of the act respecting chattel mortgages, does not declare that the default shall void the mortgage; it only ceases to be valid against certain classes of persons, *viz.* against creditors of the mortgagor, and against purchasers or mortgagees in good faith.

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It is insisted that the words "in good faith" mean "without fraud," and that the second mortgagee has the priority cast upon him, not by any act of his own, but by operation of law, and therefore he can be guilty of no fraud in taking it. It is no fraud in the second mortgagee to take a mortgage in any case with full notice of a prior unrecorded mortgage, but the fraud, against which relief is always given, consists in his attempting to set it up in displacement of the first. The fraud of Woolman Stokes is, that after he has taken his position voluntarily as second mortgagee, he attempts to set up a default which does him no harm, and asks the court so to construe the act as to inflict a penalty on his adversary. The words "in good faith," cannot be applied to creditors in this section, and therefore, if they are rendered "without fraud," purchasers and mortgagees with fraud cannot take priority, but creditors with fraud may.

Another consequence of this construction would be, that a purchaser of the chattels, before the default in re-filing, subject to the mortgage, would, after the default occurred, hold them free of the encumbrance, even where the amount of the mortgage was deducted from the price he paid, while a subsequent purchaser with notice would be subject to the opposite rule. In fact under the rule claimed, the person who does not file at all occupies a better position than he who does, as can be illustrated in this case.

Woolman Stokes took his mortgage with full notice of the Klous mortgage, and therefore it will be admitted, that under the first section of the act, if Klous had not filed at all, Stokes could never by any default on the part of Klous have acquired the priority, but by the act of filing, Klous makes his security subject to be postponed by the third section for not re-filing. It could not have been in the mind of the legislature that such consequences should flow from the passage of this law, and therefore some other interpretation must be sought for, by which the mischief aimed at may be repressed. Accepting these words "in good faith," in what has almost become their technical meaning, "without no-

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tice," the third section will be restricted to subsequent purchasers and mortgagees without notice, and what is conceived to be the policy of the statute will be fully effectuated. The publicity exacted by the act will be enforced, and purchasers and mortgagees who take their positions, without notice of prior existing equities, will be amply protected.

On the 26th day of April, 1867, before the time for re-filing had arrived, Klous and Hillburn took possession of the mortgaged chattels, by putting their foreman in charge of the Continental Hotel, the furniture of which composed the chattels in question, and ran it the ensuing season in their own names, placing Sprague and wife, and Howard A. Stokes, in a subordinate position on salaries. That Woolman Stokes was cognizant of such possession being had, is attested by his signature to the agreement of April 26th, 1867, and by other evidence in the cause, and that possession is fully recognized by the Chancellor in the order of consolidation, and by the decree in the case.

Did this possession, which was continued in the form so taken, satisfy the exaction of the statute? It is insisted that it was not immediate; that if not taken when the mortgage was executed, it has no virtue. Such an interpretation of the act is entirely too narrow, and if strictly held, would lead to results that would be inadmissible. What is immediate in such strict sense? Must it be simultaneous with the execution of the instrument? Can an hour, or a day, or a week elapse between the two acts, without vitiating the security? Will it be insisted that if three months after the mortgage was delivered the mortgagee took open possession, a mortgage taken a year thereafter would displace the first? Such could not have been the legislative intent. The object of the enactment was to give publicity to such transactions, and to sweep away these secret arrangements, by which creditors were embarrassed and defeated, and purchasers defrauded. If the subsequent mortgage is delivered before the filing of, or possession taken under, the prior one, the prior mortgage is deferred. The word immediate is

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used to exclude any presumption that the possession taken may relate back to the date of the security, and thus defeat the intermediate encumbrance. This construction, with regard to possession, will give it the same virtue given by this court to the act of filing, in *De Courcey v. Collins*, and it is manifest that the legislature intended to give the one act neither more nor less effect than the other. The mortgagee is secure, if he files or takes possession before a subsequent mortgage is given.

In every view, therefore, the Klous mortgage is entitled to its original place, and the clear right of the case is thereby promoted. It is certain that Woolman Stokes has no equitable claim to supplant it, and if permitted to do so, it would be only by the hard rule of positive statutory requirement, for, as before stated, by his answer to the bill of the bank, and by his own bill, he sets up and admits the priority of Klous and Hillburn, and the answer of Klous and Hillburn to the amended bill of the bank, filed July 1st, 1867, within the thirty days for re-filing, gave notice to Stokes that they still insisted upon their lien.

The second question regards the validity of the trustee mortgage, bearing date September 1st, 1866, acknowledged October 8th, 1866, recorded October 10th, 1866, and filed as a chattel mortgage, October 15th, 1866, given to secure one hundred bonds of \$1000 each, payable in three years to blank or bearer. It is abundantly proved that when this mortgage was executed, Sprague and Stokes were pressed by their creditors for payment or security for their claims, unable to meet their pecuniary engagements, and involved in debt to an amount beyond their ability to pay, and that their creditors were informed of their condition. Under this state of facts, Sprague and Stokes, in contemplation of law, were insolvent. Insolvency means a general inability of a debtor to answer pecuniary engagements, and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs. *Sug. on Vendors* 668; *Bayly v. Schofield*, 1 *Maule & S.* 338; *Hall v. Swift*, 4 *Bingham's N. C.* 381.

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The trustee mortgage provides that until default occurs in the payment of the bonds, Sprague and Stokes should remain in possession of the mortgaged premises and the personal property, and receive the rents, issues, and profits thereof. After the mortgage was executed, the bonds were left in the hands of the mortgagors for distribution among their creditors, or for such disposition as they might choose to make of them. Mr. Mitchell, one of the trustees, testifies that shortly after the execution of the mortgage, a meeting of some of the creditors was held in New York, at which they were urged to take these bonds, and the inducement held out to them was, that they would be secured by taking them, while their claim would be more doubtful if they did not, and there would be delay in litigation and expense attending a prosecution, and that the creditors seemed to be willing, after hearing these representations, to take the bonds. Rowland Johnson, one of the creditors who attended the meeting in New York, says, it was understood at that meeting that Sprague and Stokes were not able to pay any other way than by these bonds, and that the best thing the creditors could do was to take them. Under these circumstances the mortgage was executed, and the bonds passed to the creditors.

That a debtor in insolvent circumstances may prefer certain creditors, has been too long the received law of this state to be questioned now. But the proposition that an insolvent may execute a mortgage to trustees, payable in three years, or twenty years, at his pleasure, for an amount that will more than absorb his property, and take the bonds secured by it into his own possession, and with his property thus beyond the reach of legal process, pass them to such of his creditors as may feel constrained to accept them, has heretofore received no judicial sanction in this state. A scheme better adapted to delay and hinder creditors, cannot well be conceived. This device operated as an obstruction to creditors, and its effect in this case was, as it will be in all cases, to coerce them into acceding to the debtor's terms,

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under the apprehension that otherwise the bonds would be negotiated to *bona fide* purchasers, or passed to other creditors, whose fears could be more readily excited. The creditor when offered these bonds, at once saw that he would be subjected to an expensive litigation to sweep away this mortgage in the pursuit of his legal remedy, and it must be conceded, that if this plan can be successfully carried out, the debtor will practically dictate terms to those to whom he is indebted, and it will be at his option whether they shall take a security maturing in three or in thirty years.

After this mortgage was executed, and before Sprague and Stokes passed away the bonds, equity, on the application of a judgment creditor, would certainly have enjoined their transfer, on the ground that the proceeding was in delay of creditors; the transaction must still be vicious, unless their success in negotiating them before the resistance of legal process could be interposed, has changed its character. It is no answer to say, that while this scheme was unlawful on the part of Sprague and Stokes, the creditors, who took them in good faith as the best thing they could do under the circumstances, should not be disturbed. This reasoning would in almost all cases render the statute of frauds a dead letter. But creditors, under such circumstances, are tainted with the fraud inhibited by the statute; they are presumed to know the law, and are chargeable with a knowledge of the fact that such conveyance is in contravention of positive enactment, and they thus become partners in the fraud which is imputed to their debtor.

This case cannot be distinguished in principle from *Owen v. Arvis*, 2 *Dutcher* 23. In that case Owen, the insolvent debtor, desiring to prefer his other debts to those which he had incurred as surety for one Bross, conveyed his estate real and personal to his son, and took back from the son a mortgage of \$11,000, securing bonds, of which \$500 matured each year until the whole were due. In pursuance of the express purpose for which this transfer was made, the father in a short time thereafter passed this mortgage to the

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avored creditors. The Bross creditors having obtained judgments, levied on the goods conveyed to the son, who thereupon replevied. Chief Justice Green, in delivering the opinion of the court, says: "That the question of fraud cannot enter at all into the discussion, that that point was submitted to the jury and decided by them, and that it must be assumed that the transfer to the son was for a valuable consideration, and that in point of fact there was no fraud meditated or perpetrated." "That admitting that the conveyance by the father and the subsequent assignment of the mortgage to the creditors, constitute but parts of one and the same transaction; that the sale was, in fact, made for the benefit of the creditors, and the proceeds honestly applied in payment of their debts, upon the terms specified in the deed of assignment, still the conveyance was illegal and void as against creditors, whose claims were hindered or defeated." "That the conveyance was fraudulent and void, under the second section of the act to prevent frauds and perjuries, because the consideration money of the purchase was left in the hands, and under the control of the vendor. The bond and mortgage was held by the debtor subject to his own absolute control. The case, as made by the debtor himself, is that the debtor might control the proceeds, and apply them to the payment of such debts as he felt under the greatest obligation to pay. By the well settled principles of law, in the absence of all statutes regulating assignments, an assignment or conveyance of property for the benefit of creditors is void, if the property is left to any extent under the control of the debtor; the rights of the creditors must be fixed by the deed itself."

Again: the Chief Justice quotes with approbation the language of Judge Jewett, in *Sheldon v. Dodge*, 4 Denio 221: "I take it to be well established, and the doctrine was not controverted on the argument, that a debtor cannot put his property beyond the reach of creditors, by assigning it to trustees for the payment of his debts, unless at the time he definitely settle their respective rights by the convey-

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ance." And Justice Potts, in his opinion, says: "That the debtor subsequently, in pursuance of his intention at the time of the conveyance, assigned the mortgage to a portion of his creditors, does not purge the fraud. If the creditors, who accepted the compromise offered them, have been thereby placed in an unfortunate position, it is to be regretted, but we might as well repeal the statute of frauds entirely as to permit it to be thus evaded."

How can the trustee mortgage be sustained, under the application to it of the criticism of the court in *Owen v. Arvis*? What substantial distinction can be drawn between the two cases? There it was an absolute conveyance of the debtor's property; here it was by way of mortgage for over \$80,000 more than the property produced at the sale; a difference in form, not in substance. In *Owen v. Arvis*, the effect of the conveyance was to put under the control of the debtor the mortgage which represented his property; in this case it put into the hands of Sprague and Stokes the bonds which the mortgage on their property secured. There the question of intentional or actual fraud and the form of the conveyance were eliminated from the discussion, and the scheme swept away because it effected precisely what has been done in this case. This transaction must, therefore, be regarded as one intended to hinder and delay creditors, within the meaning of the second section of the statute of frauds.

The rule of law thus announced does not, however, dispose of this branch of the case. The question remains, as to whom this trust mortgage shall be treated as void, in the situation in which this case presents the respective parties to the court. The statute does not make it absolutely void; it is good as between the parties; it is good as against every body but those who are hindered or defeated. It is to be distinguished from the case of a security declared absolutely void as to all persons, for usury or gaming, where the other encumbrances must, *ex necessitate*, when the tainted instrument is removed, take its place.

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In this case a person claiming to set aside the vicious conveyance must establish his position as one of those in whose aid the statute is framed. That he occupies such position the parties adverse to him in interest may contest, and the only way in which the issue can be formed and this matter brought to the consideration of the court, is by the pleadings. If the creditor sets up this defence in answer, the debtor or the preferred creditor may show that he assented to the arrangement, that he has released his claim to the property affected by it, or any other matter applicable to the case, and if he files no answer, the court cannot even say that he is dissatisfied with the arrangement. The affirmative is upon the creditor, and it is incumbent upon him to place himself upon the record so that his opponent can be heard and his case adjudicated. "It is a fundamental maxim that no proof can be admitted of any matter which is not noticed in the pleadings. This rule applies as well to answers as to bills, and a defendant cannot avail himself of any matter in his defence which is not stated in his answer, although it should appear in evidence." 2 *Daniell's Ch.* 992-993, and cases cited in notes.

Woolman Stokes joined in the bill with the trustees to foreclose their mortgage and the chattel mortgage to himself for \$12,000, in which he asks for a decree enforcing them in the order of their respective dates, and he also joined with Sprague and Stokes and the trustees in their answer to the bill of the bank, setting up the validity of the trustee mortgage, and therefore his \$12,000 mortgage cannot, in any event, gain priority over the trustee mortgage. The right of priority as between the \$12,000 mortgage and the creditors holding liens subsequent in date, not having been submitted to this court, cannot now be settled.

The creditors who have failed to file their answers, setting up that this trust mortgage operated to hinder or delay them, can have no relief here. Of that class is Elisha Woolley, who, though an appellant here, filed no answer in the court below, and therefore his appeal must be dismissed.

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To the creditors who did answer, no relief can be extended until they are properly before us by appeal. Of the latter class are A. V. Conover, Arthur Kendall, and Stratton and Brother. There may be others who have been overlooked in my examination of the mass of papers in this case.

Under the view here taken it is not necessary to determine whether the ten bonds given to Klous to secure the advances made to Mrs. Sprague, which is her individual debt, and the fifteen bonds given to Woolman Stokes to secure the individual debt of Howard A. Stokes to him, are valid as against creditors. The bondholders, not having made that issue, cannot contest it as between themselves. To exclude any presumption that the validity of that appropriation of the partnership funds is assented to, it may be well to say, that in *Kirby v. Schoonmaker*, 3 Barb. Ch. 47, Chancellor Walworth held the contrary doctrine, and based it upon what seems to be sound reasoning.

The result is, that the decree below must be reversed, and a decree rendered giving the Klous and Hillburn chattel mortgage the place it originally occupied in order of priority, with costs to them in this court and in the court below.

Let the record be remitted to the court below, that there may be a reference and decree in accordance with the views herein expressed.

The whole court concurred.

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The cost of printing the case in this court cannot be included by the successful party in his taxed bill of costs.

This was a motion on part of the appellant, to allow the cost of printing the case to be taxed with the costs.

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Mr. J. F. Randolph, in support of the motion.

Mr. C. Parker, contra.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The decree in this case was in favor of the appellant, and the costs of the appeal were awarded to him. The case on appeal was printed by him, and the present motion is to direct the clerk to include this expense in the taxed bill.

This has never been the practice. No bill of costs can, probably, be produced from the files of this court containing this item. This part of the expense has heretofore always been borne by the party bringing the appeal. If, therefore, this court had the power to award this expense to a successful appellant, still no reason appears to exist why the case should be taken out of the established course.

Besides, upon examination it will be found that this practice has a statutory foundation. In the act relating to fees and costs, (*Nix. Dig.* 313,) it is enacted that "where no fees are by law provided, the same fees shall be allowed to the same officers and persons as are allowed by law for like services in the Court of Chancery." But neither in the provisions of this act relating to this court nor in that regulating the fees in chancery, is there any allowance which will fairly embrace the present claim. If the clerk of this court had provided these printed cases, it would seem that this expense might be a legitimate charge. But by the rules of this court the party, and not the clerk, is required to perform this service. Until these rules are changed there can be no charge in the bill, for costs thus incurred.

It was suggested that by force of the act of 29th March, 1866, (*Nix. Dig.* 119, § 2,) the Chancellor being now enabled to order the cost of printing the evidence to be included in the taxed bill, has had framed a rule to that effect, and that, as by the fees and costs act, the costs in the two courts are made the same, this item, though formerly inadmissible, is

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now made a legal charge. But the act regulating fees, in the clause referred to, has no prospective bearing. The language is, that the same fees shall be allowed in this court "as are allowed," &c., in the Court of Chancery. There is nothing in these expressions which indicate a purpose to make the fees in this court liable to the charges which may from time to time be introduced by the legislature into the fee bill in the other court.

The motion to include the cost of printing this case in the taxed bill, must be refused.

MARSHMAN and wife *vs.* CONKLIN and others.

1. A promise to execute a deed or writing in the nature of a declaration of trust of lands, cannot be proved by parol.

2. A party can have relief, if at all, only on the case made by his bill. Evidence relative to matters not stated in the pleading, nor fairly within its general allegation, is impertinent, and cannot be made the foundation of a decree.

3. A failure or refusal by a grantee of lands to execute a declaration of trust therefor in accordance with an alleged promise so to do, ~~does not~~, of itself, amount to what is meant in law by fraud, imposition, unconscionable advantage, or undue influence.

This was an appeal from a decree dismissing complainants' bill.

Mr. C. Parker, for appellants.

Mr. I. W. Scudder, for respondents.

The opinion of the court was delivered by
DALRIMPLE, J.

The complainants' bill sets up a trust of certain lands or undivided interest therein, conveyed by complainants, who are husband and wife, to the defendant Conklin. The con-

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veyance is absolute upon its face, and the trust is sought to be established by parol. The relief prayed is a reconveyance by the defendant Conklin, subject to first liens, of all the lands which remain unsold, and an account of the proceeds of sale of certain parts of the lands which have been sold by Conklin at auction. The answer denies the trust, and in substance avers that the conveyance was absolute and unconditional, and upon good and sufficient consideration. The consideration paid, or agreed to be paid, is shown, and the circumstances under which the conveyance was made are minutely detailed.

It is enacted by the statute of frauds (*Nix. Dig.*, 358, § 11,) that all declarations or creations of trusts or confidences of any lands shall be manifested and proved by some writing, signed by the party who shall declare such trust. It is well settled by reported decisions of the courts of this state, that an express trust of lands can only be evidenced by writing, signed by the party who is alleged to have created such trust. *Whyte v. Arthur*, 2 *C. E. Green* 523. There can be no fair pretence that this trust is of that class which is mentioned and protected in the 12th section of the statute. The section last mentioned relates only to trusts which may arise by implication or construction of law. The charges of the bill in this case are, and the complainants have their right to relief upon the alleged fact, that at the time of the conveyance to the defendant Conklin, he promised to execute to Mrs. Marshman a deed or writing in the nature of a declaration of trust, showing her beneficial interest in the property.

There being no such evidence of the alleged trust as required by the statute, the complainants must, on this ground, fail in their suit.

The property in question was the separate property of Mrs. Marshman, and the only consideration of the conveyance to Conklin was a debt of the husband, on bond originally given to Conklin, which he had assigned with a guaranty of payment. This debt Conklin paid according to

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agreement, with money raised on his own bond or note, secured by mortgage on the premises conveyed to him. Prior to the conveyance now in dispute, Conklin was the owner of an equal undivided half of the premises, Mrs. Marshman being the owner of the other half. The learned counsel who argued for the complainants, earnestly insisted that sufficient evidence appears in the case to induce the belief that the conveyance had been procured by fraud, imposition, unconscionable advantage, or undue influence.

The answer to this ground for relief is two fold. In the first place, no such issue is made by the pleadings. On the contrary, the bill alleges an express trust, and seeks to have the same carried into execution. We cannot now find the defendant guilty of fraud and imposition, and decree against him on that ground, when no such charge has been made against him. The complainants must recover, if at all, on the case made by their bill. That is the only case the defendant has been called upon or had an opportunity to answer. The rule is aptly stated by Chancellor Williamson, in the case of *Vansciver v. Bryan*, 2 *Beas.* 436, thus: "Evidence relative to matters not stated in the pleading, nor fairly within its general allegation, is impertinent, and cannot be made the foundation of a decree." To the same effect are the cases of *Parsons v. Heston*, 3 *Stockt.* 156, and *Moore v. Moore*, 1 *C. E. Green* 276. In the second place, neither of the complainants in their evidence intimate that they were in anywise imposed on, save in that their confidence in the defendant was misplaced. They may have believed that he would fulfill his promise, and execute the declaration of trust. He failed to do so. Assuming all this to be true, it does not amount to what is meant in law by fraud, imposition, unconscionable advantage, or undue influence. There was no mistake or misrepresentation as to the subject matter, consideration, or form of the conveyance. The complainants probably entertained the mistaken notion that the defendant could be compelled to execute a declaration of trust, in case he should refuse to

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do so. This was, at most, but a mistake of law, against which a court of equity cannot grant relief.

Nor can I perceive that the fact that the owner of the property who now sets up the trust is a married woman, varies the case. It is not disputed that the deed was executed and acknowledged in such form as to pass the estate of a *feme covert*. In the case of *Demarest v. Wynkoop*, 3 Johns. Ch. 144, Chancellor Kent, says: "There is no doubt that a wife may sell or mortgage her separate property for her husband's debts. Her deed, under her separate examination before a competent officer, is as valid with us as if she passed her estate by fine at the common law." I think there can be no question that the same rule prevails in this state. There is a class of cases to the effect that while courts of equity will permit a married woman in many respects, to transact as to her separate property as if a *feme sole*, it requires all such transactions to be fair and open, and free of fraud, imposition, unconscionable advantage, or undue influence. 1 *Story's Eq. Jur.*, § 243; *Dalbiac v. Dalbiac*, 16 Ves. 125. I am not aware, however, that the doctrine of these cases in anywise affects the questions now before this court.

Mr. Marshman, in one part of his evidence says, that the document or paper which Conklin was to give, was to show that the complainants had a half interest in the sale of the property. If by this he means to say that the conveyance was made upon the consideration that the grantors should receive a certain portion of the proceeds of the sale of the property, and such should turn out to be the truth of the case, it may be that they have an action at law for such share of the proceeds, but I have not been able to find any ground of equity upon which the case, as now presented on the pleadings and proofs, can rest.

The decree below must be affirmed with costs.

The whole court concurred.

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THE JERSEY CITY AND HOBOKEN HORSE RAILROAD COMPANY, appellants, and THE JERSEY CITY AND BERGEN RAILROAD COMPANY, respondents.

The J. C. and H. Horse Railroad Company, and the J. C. and B. Railroad Company, were authorized by their charter, to build a railroad through certain streets of Jersey City, to the ferry, subject to first obtaining the consent of the common council. By an ordinance, passed December 13th, 1859, the J. C. and B. Company were authorized to lay a single track in certain streets. The 3d section of that ordinance imposed the following condition: "The consent to the said company to lay said track in Montgomery street to Newark avenue, and in Newark avenue to Grove street, and in Grove, Gregory, and York streets, *as stated in the first section*, is upon condition that the J. C. and H. Horse Railroad Company shall have the joint use for their cars, of any track that shall be laid in said streets by virtue of such consent, and that if any disagreement shall arise between said two companies, as to the expense or manner of laying said tracks, or the use thereof, such disagreement shall be finally adjudicated and settled by the common council." The 9th section provided that the ordinance should go into effect as soon as the J. C. and B. Company should, under their signature and seal, agree that they would apply, at the next session of the legislature, and obtain if possible an amendment to their charter, so that in obtaining the consent of the common council to lay their rails, they should be subject to such conditions as said council by ordinance may have imposed. Such agreement was executed by the Bergen Company, December 14th. They accordingly obtained a supplement to their charter, which was approved March 17th, 1860. The 2d section of that supplement provides: "That the said J. C. and B. Railroad Company, in laying, repairing, and maintaining their rails, and constructing their roads in the streets of Jersey City, shall be subject to such conditions as the common council of said city in *the ordinance granting consent* to lay such rails and construct said road, shall have imposed, or shall impose upon said company." The common council passed an ordinance January 10th, 1860, authorizing the J. C. and H. Company to lay a single track through certain streets. The 3d section of this ordinance provides, that the Hoboken Company shall have the joint use of the tracks of the Bergen Company, so far as may be necessary to run the cars of the Hoboken Company to and from their tracks in certain streets to Hudson street, *upon their agreement* with the Bergen Company, in accordance with section three of their ordinance passed December 13th, 1859. *Held—*

1. That the condition of the 3d section of the Bergen Company's ordinance is, by virtue of their agreement with the Hoboken Company, and of the 2d section of said supplement of 1860, as effectually a part of that sup-

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plement as if embodied in terms therein, and binding upon the Bergen Company, and the Hoboken Company is entitled to the joint use of the Bergen Company's track through the streets specified.

2. That right, though vested, cannot be exercised entirely at the expense of the Bergen Company.

3. The provision that, in case of disagreement between the companies as to the expense or manner of laying the tracks, or their use, such disagreement should be finally adjudicated and settled by the common council, was proper and lawful. It became embodied in the act of incorporation, and is a condition on which the franchise is to be enjoyed, and does not depend merely upon the force of an agreement to arbitrate.

4. The termination of the agreement as to the terms of use of tracks through certain streets (pursuant to notice, in accordance with the terms of the agreement) did not affect the *right* of joint use of the Bergen Company's tracks, or entitle the Bergen Company to enjoin the use by the other until a new agreement could be made, or the common council should adjudicate the matter.

5. The common council had no power to declare a forfeiture by the Hoboken Company of their right to use the Bergen Company's tracks, for non-payment of the amount adjudicated. That right is vested, and no authority was given to the council to forfeit for non-payment.

6. The words "upon their agreement," &c., in the 3d section of the ordinance of January 10th, 1860, do not qualify the right of the Hoboken Company: that right became fixed by the ordinance of December 13th, 1859.

7. The true intention of the said ordinance of January 10th, 1860, was only to subject the joint use to just such condition as was contained in the 3d section of the Bergen Company's ordinance.

8. The tracks of the Bergen Company subject to the joint use by the Hoboken Company are those only, named in the 3d section of the Bergen Company's ordinance of December 13th, 1859.

The opinion of the Chancellor is reported in 5 *C. E. Green* 62.

Mr. Gilchrist, Attorney-General, for appellants.

Mr. L. Zabriskie and *Mr. I. W. Scudder*, for respondents.

The opinion of the court was delivered by

BEDLE, J.

This is an appeal from an order of the Chancellor, made on bill, answer, and affidavits, enjoining the appellants from

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using certain horse car tracks of the respondents in Jersey City. The tracks in question run from near the Jersey ferry, through Montgomery street and Newark avenue to Jersey avenue, and from the intersection of Grove street with Newark avenue, through Grove and other streets back to Montgomery street, near the ferry. Both of these railroad companies were incorporated in 1859, and each was authorized to build a railroad through the streets of Jersey City to the ferry, subject to first obtaining the consent of the common council. On the 13th day of December, 1859, the common council passed an ordinance (approved by the mayor, December 20th, 1859), authorizing the Jersey City and Bergen Railroad Company to lay a single track in Montgomery street from Hudson street (which is near the ferry) to Newark avenue, and through Newark avenue to the westerly boundary of the city, and through Grove street from Newark avenue to Montgomery street, through Montgomery street to Gregory street, and through Gregory street to York, and through York to its junction with Hudson street, and through Hudson to Montgomery street (which is the beginning near the ferry.) The authority also extended to other streets, but only those stated are involved in the present issues. These provisions are contained in the first section of the ordinance, and the third section imposed the following condition: "The consent to the said company to lay said track in Montgomery street to Newark avenue, in Newark avenue to Grove street, and in Grove, Gregory, and York streets, as *stated in the first section*, is upon condition that the Jersey City and Hoboken Horse Railroad Company shall have the joint use for their cars of any track that shall be laid in said streets by virtue of such consent; and that if any disagreement shall arise between said two companies, as to the expense or manner of laying said tracks, or the use thereof, that such disagreement shall be finally adjudicated and settled by the common council of said city." Other conditions were also imposed; and the ninth section provided that the ordinance should

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go into effect as soon as the Jersey City and Bergen Company should, under their signature and seal, agree that they would apply for, at the next session of the legislature, and obtain, if possible, an amendment to their charter, so that in obtaining the consent of the common council to lay their rails, they should be subject to such conditions as said council, by ordinance, may have imposed. In compliance with that section, the Bergen company, December 14th, 1859, executed to the city an agreement that in consideration of the consent to lay rails, by the ordinance passed December 13th, 1859, they would apply for an amendment, by which they would be made subject to the conditions that the common council may have imposed upon them by that ordinance, and that they would, if possible by fair and lawful means, obtain the passage of the same; which agreement was on the day of the approval of the ordinance filed with the city. After that, the Bergen Company obtained a supplement to their charter, (approved March 17th, 1860,) the first section of which makes them subject to city taxes and water rents, according to one of the conditions of the ordinance, and specially provides that the amount of such taxes shall be deducted from the one-half of one per cent., which, in their charter, they were bound to pay the state treasurer in lieu of all other taxes; and then follows the next section in these words: "That the said Jersey City and Bergen Railroad Company in laying, repairing, and maintaining their rails and constructing their roads in the streets of Jersey City, shall be subject to such conditions as the common council of said city, in *the ordinance granting consent* to lay such rails and construct said road, shall have imposed, or shall impose upon said company." Previous to the passage of this supplement, the common council, January 10th, 1860, passed an ordinance (approved by the mayor, January 18th, 1860), by which authority was given to the Jersey City and Hoboken Horse Railroad Company to lay a single track, commencing at the intersection of Newark avenue and Jersey avenue, through Jersey avenue and other streets

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to North Fourth street, and through North Fourth street to Grove; thence north through Grove street to the northerly boundary of the city; and also from the intersection of Newark avenue and Grove street, north through Grove street to North Fourth street, &c. And in the third section of that ordinance it was provided that the Hoboken Company shall have the joint use of the tracks of the Jersey City and Bergen Company, so far as may be necessary to run the cars of the Hoboken Company to and from their tracks in Jersey avenue and Grove street to Hudson street, upon their agreement with the Jersey City and Bergen Company, in accordance with section three of their ordinance, passed December 13th, 1859.

These two ordinances show the relation of the companies to the city and the character of consent that had been given when the supplement was passed. Montgomery street and Newark avenue together formed the main route from the ferry, and each company needed its use; the Hoboken Company to get from the ferry to connect with their tracks in Grove street and Bergen avenue, the Bergen Company to get through the city to the westerly boundary; and both in returning to the ferry, needed the route through Grove street from Newark avenue, and thence through the different streets to Montgomery street at Hudson street; and the common council, by the two ordinances, evidently intended to make provision for the accommodation of each company by the one track. Both companies built their tracks upon the strength of those ordinances and supplement of 1860, the tracks in Montgomery street and Newark avenue, and from Newark avenue through Grove and the other streets returning to the ferry, being built at the expense of the Bergen Company. The validity of the injunction depends upon the right of the Hoboken Company to use those tracks between the ferry and Grove street and Jersey avenue, and that depends upon the construction and effect of the ordinance of December 13th, 1859, and the supplement of 1860. The legality of the conditions in the ordinance without the

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aid of the act, need not be discussed, as the act in effect validated all such conditions as were within its scope, and gave them the force of legislative enactments. Does the act then include the condition of the third section of the Bergen Company's ordinance?

That section says that the consent to lay said track, &c., is upon condition that the Hoboken Company shall have the joint use of any track that shall be *laid* in said streets by virtue of such consent, &c. The supplement says that the Bergen Company in *laying*, repairing, and *maintaining* their rails and constructing their roads, shall be subject to such conditions as the common council, in the ordinance granting consent to *lay* such rails and construct such road, shall have imposed, &c. No verbal analysis of the statute is required to ascertain its application. One great object of the city was to dispense with the necessity of two tracks. Each company was empowered by its charter to construct a road to the ferry with the consent of the city, and the consent to the Bergen Company was upon the express condition that the other company should have the joint use of their tracks, thereby intending that one set of tracks should answer for both. The agreement to apply for an amendment, by which the Bergen Company would be made subject to the conditions imposed by the ordinance granting consent to lay their rails, clearly includes the condition of the third section; the supplement of 1860 is a fulfillment of that agreement, and its terms are sufficiently broad to embrace what the agreement contemplated. It certainly could not be required of us to restrict the full operation of the words, or to adopt any stinted construction, whereby the act may be made less comprehensive than the agreement. I am unwilling to hold that the second section applies only to the material laying and maintaining of the rails, and not to the conditions upon which the laying was authorized. That section embraces the third section of the ordinance, and by reason thereof the same has become as effectually a part of the supplement as if embodied in terms therein.

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What, then, is the effect of that legislative provision? It dispensed with the necessity of any consent by the city for any separate track to enable the Hoboken Company to reach the ferry, and subjected the franchises of the Bergen Company to the joint use by the other company of certain tracks to accomplish that purpose. The right of the Bergen Company to lay their rails was burthened with that joint use, and the same, by necessary implication, inured to the benefit of the Hoboken Company, for whom the provision was intended. Here were two corporations, each empowered to construct a road to the ferry, and instead of separate tracks, consent was given to one company to lay down a particular route, upon condition that the other should have the joint use of it on certain terms. Now, with the franchises of one company burthened with that condition, and the other authorized to operate the same kind of a road to the same locality, it must follow, as a necessary construction, that the company for whose benefit the condition was imposed, is entitled to it. This is purely a matter of construction and application of legislative grant or franchise, and is not controlled by the question, whether a third person can claim the benefit of a mere contract to which he was not privy. The Hoboken Company was entitled to the benefit of the third section of the ordinance by force of the supplement, and that is a vested right which the Bergen Company cannot impair, and subject to which the tracks of the Bergen Company were laid. This is not a case of taking private property for public use. The tracks were laid subject to the joint use, and the franchises must be enjoyed accordingly.

The next inquiry is, as to the terms under which the right of the Hoboken Company is to be enjoyed. Is it a right, although vested, that may be exercised entirely at the expense of the Bergen Company? I think not. The ordinance does not expressly say that the Hoboken Company shall be liable to contribute towards the expense of laying the track, or pay for the use if they do not, but the fair meaning is that they shall be liable to bear a part of the

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expense of the construction of the tracks and their maintenance, or to compensate in some way for the use, if the tracks are laid and maintained at the expense of the Bergen Company. That conclusion is warranted from the provision, that if any disagreement shall arise between the two companies as to the expense or manner of laying the tracks, or the use thereof, such disagreement shall be finally adjudicated and settled by the common council. This pre-supposes an agreement by the parties interested concerning the construction of the tracks, or an equivalent for the use, but in case they disagree, then the common council must adjudicate and settle it. The failure of the companies to agree, does not defeat the right of use, for that is vested. The right continues, and the disagreement is to be settled in the way pointed out by the ordinance. There can be no objection to such a provision being embodied in an act of incorporation, and making it a condition under which a franchise is to be enjoyed. Such is the case before us, and it does not depend upon the mere force of agreements between parties to arbitrate. By treating the right as vested, the public are secure in the continuance of their accommodation without interruption by disagreements. The companies are to agree, if possible; and if not able, a special mode of settlement is provided, to which resort must be had before the aid of the courts is sought. Now in point of fact the companies did agree that the Hoboken Company should use the tracks of the other in question, in consideration of the use by the other of the tracks of the Hoboken Company through Grove street, north of Newark avenue, in order to make a communication for the Bergen Company from the Jersey ferry to the Pavonia ferry, via Grove street and Pavonia avenue, subject to the right to terminate the same on notice, and in accordance with that arrangement, each company ran its cars for several years, and up to March 23d, 1868, when the Bergen Company terminated the same by notice, they having in August before built a track in Erie street, (next parallel with Grove,) to Pavonia

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avenue, which they used instead of the Grove street route. Upon the termination of that arrangement, a disagreement arose about compensation for the use of the track by the Hoboken Company, but such termination of the agreement did not affect the *right* of joint use, or entitle the Bergen Company to enjoin the use by the other until a new agreement could be made, or the common council should adjudicate the matter. But the companies having disagreed, the council, September 15th, 1868, passed an ordinance requiring the Hoboken Company to pay \$300 a year, from the 1st of May previous, for each car run upon the tracks, in monthly payments, from the date of the ordinance, the amount between the 1st of May and that time to be paid immediately, and in default of payment on demand, the Hoboken Company to cease all use of the tracks of the Bergen Company, and the latter company to be released from all conditions and obligations on account of the provisions of the third section of the ordinance, approved December 20th, 1859. Default having been made in the payment, the respondents also claim that by reason of that ordinance the Hoboken Company had no further right to use their tracks. The Hoboken Company attack that ordinance for various reasons, and among them, that the council had no power to forfeit or defeat their right. This necessarily follows, if we regard the right as vested, as there is no authority given to the council to declare that the right shall cease for non-payment of the amount they adjudicate. They may determine what shall be paid, if they choose to settle the matter in that way, but cannot forfeit for non-payment any more than they could issue an execution to collect the money. When the adjudication is properly made, if in the shape of a money compensation, its collection may be enforced in the proper court, but not by any forfeiture of the right to use the tracks. Whether the ordinance of September 15th, 1868, is good or bad, as fixing the amount of compensation to be paid, need not now be asked; for if good, the respondents have a legal remedy for the recovery of the money, and if bad, a proper

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adjudication by the council in the absence of an agreement by the parties, is a precedent condition to any recovery, if such adjudication can be had ; and whether had or not, any remedy, whether legal or equitable, must be based upon the recognition of the right of joint use as vested. The words "upon their agreement," &c., in the third section of the ordinance of January 18th, 1860, do not qualify or embarrass the right of the Hoboken Company, for as already stated, that right became fixed by the ordinance of December 20th, 1859, validated by the act of 1860. The third section of the January ordinance has no legal efficacy in securing the joint use, and has received no legislative sanction. The true intention of it, however, was only to subject the joint use to just such condition as was contained in the third section of the Bergen Company's ordinance.

The ordinance of January 12th, 1869, passed by the council, fixing the yearly sum of \$100 per car instead of \$300, is not of any importance in the issues before us. Its validity, therefore, is undetermined.

The question of abandonment raised in the bill, can be disposed of by the remark that the reason why the Hoboken Company ceased to use the tracks for a few months is in dispute, and besides, there is no evidence to conclude that the right of the company has been abandoned.

It remains only to consider what tracks the Hoboken Company are entitled to use. The ordinance of the Bergen Company is the effective one, and that cannot be held to extend beyond Grove street in Newark avenue. The third section designates the first part of the route, in Montgomery street to Newark avenue and in Newark avenue to Grove street ; and the other part is designated in Grove, Gregory, and York streets, *as stated in the first section*. There is some difficulty in the phraseology of this latter clause, parts of streets necessary to complete the route to the intersection of Hudson and Montgomery streets, at the ferry, being left out ; but regarding the track as continuous, and referring it to the first section, it may well be held as embracing

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the description of that section, extending through Grove street from Newark avenue, and thence through the different streets named to Hudson street, and through that to Montgomery street. Such has been the practical construction of the parties, and the respondents make no insistent to the contrary. The Hoboken ordinance gives the consent of the city for the joint use of the tracks to and from the Jersey avenue tracks; but after the passage of the Bergen Company's ordinance, limiting the joint use to Grove street, I do not consider that the council could qualify the consent they had given by compelling a joint use of tracks not already burthened. The supplement of 1860 made the Bergen Company subject only to such conditions as the council *in that company's ordinance* shall have imposed, or shall impose upon said company. No additional burthen has been imposed since the passage of that act. Between Grove street and Jersey avenue, in Newark avenue, the Hoboken Company show no right to the joint use of the respondents' track; and therefore, to that extent only the injunction should be retained, but in all other respects the order for its allowance should be reversed. The appellants may be allowed the costs of this appeal.

The decree was reversed by the following vote :

For reversal—BEASLEY, C. J., BEDLE, CLEMENT, DALRIMPLE, KENNEDY, OLDEN, SCUDDER, VAIL, VAN SYCKEL, WALES, WOODHULL. 11.

For affirmance—OGDEN.

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NOVEMBER TERM, 1870.

HARRIS and others, appellants, and VANDERVEER'S EXECUTOR, respondent.

1. At the time of the execution of the will the testator's hearing was seriously impaired, and his eyesight almost gone; probate of the will refused, because it did not appear that its contents were in any way made known to him before or at the time of its execution.
2. The burden of proof is on the proponent; it will not be presumed from the fact that the testator had testamentary capacity, that he would not have executed the will without understanding its contents.
3. Not necessary to decide whether testator's declarations, before and after execution of the will, are admissible.

This is an appeal by the caveators from a decree of the Prerogative Court, admitting to probate the will of the late Dr. Henry Vanderveer. The opinion of the Ordinary is reported in 5 *C. E. Green* 463.

Mr. Wurts, Mr. Shipman, and Mr. C. Parker, for appellants.

Mr. Williamson and Mr. Frelinghuysen, for respondent.

The opinion of the court was delivered by
VAN SYCKEL, J.

The several appeals in this case submit to review the right of the respondent to have probate of a paper bearing date August 23d, 1865, purporting to have been executed by Dr. Henry Vanderveer, late of the county of Somerset, as his last will and testament.

The rights of the next of kin and the heir-at-law, upon the death of the ancestor intestate, to such worldly estate as he may leave, is securely guarded by our laws, and can be divested only by a testament executed in strict conformity

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with law. While the courts of this state have ever guarded with exacting jealousy the right of testamentary disposition, the burden has always been cast upon the proponent, of establishing a strict compliance with every essential to the validity of a will.

The will in this case has been assailed upon three principal grounds. 1. Want of testamentary capacity. 2. Undue influence on the part of Dr. Cornell. 3. Imposition of the instrument upon the testator without a full knowledge on his part of its contents.

The evidence presents the testator, both before and after the execution of this paper, as a man of vigorous intellect, a gentleman of the old school, of much culture and refinement, and exempt in a rare degree from physical and mental infirmity, at the advanced age of more than four score years; and although at the date of the disputed will his eyesight and hearing were much affected and his general health impaired, there is no sufficient evidence which denies to the testator the possession of testamentary capacity. There is, also, an absence of evidence to show that Dr. Cornell, however much he may have urged his good offices on the testator, or whatever may have been his desire to secure for himself or his son a place in his testamentary disposition, had acquired such influence as would have enabled him unduly to induce the testator to execute, with full knowledge of its contents, any paper which did not express his own purposes with regard to his estate.

The case of the appellants must stand, if at all, upon their third ground of objection.

Is the evidence of such a character that it satisfies the mind and judgment of the court, that the will of August 23d, 1865, was executed by the testator with full knowledge on his part of its contents? While the intellect of the testator was somewhat clouded by a temporary illness, it is clearly shown that his hearing was seriously affected, and his eye-sight almost gone, at the time his signature to the instrument in question was procured. The testamentary

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witnesses substantially state this fact, and it is put beyond question by Brown, Vanarsdale, J. F. Vanderveer, Ames, and others, so that it must be regarded as a conceded fact in the case. A blind and deaf person may make a will, but it must be shown by the proponent to the satisfaction of the court, that he knew its contents and was not imposed upon in its execution. This introduces a new element into the consideration of this controversy, and starts the inquiry, not only whether he signed and pronounced it to be his true last will and testament, in the usual form of execution, but whether he fully understood its contents. Naylor, the first testamentary witness, says that the will was not read in his presence, nor did the testator say that he knew what it contained. Wight, the other subscribing witness, says he read the will as a whole to the testator in the presence of Dr. Cornell, but does not say that the testator acknowledged, or in any way signified that he understood what was read to him; and Dr. Cornell in his examination in chief says, that after the will was written, he came into the room, and the will was read to him, Dr. Cornell.

The evidence then strictly is, that Wight says he read the will to testator in presence of Dr. Cornell, and Dr. Cornell says it was read to him; neither asserting anywhere that the testator admitted at the time, or afterwards, that he understood its contents. Neither Wight nor Dr. Cornell pretends that the testator asked the legal effect of any provision made, or expressed the least desire to have any passage read a second time, or suggested the slightest change in the disposition made. Giving full credit to this evidence, does it fully discharge the proponent from the burden which the law imposes upon him?

A simple examination of this will shows the difficulty the testator in his then condition, would have had in comprehending its provisions upon a single reading. There is a volume of other evidence in the cause which must have an important bearing on this issue. William Vanarsdale testifies that a day or two after this will was executed, the

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testator asked him if he knew Wight; that Dr. Cornell and Wight had been making his will, and he didn't know whether it was right or not; that Wight was a stranger, and he didn't know whether he would do it right. In 1867, the testator told Dr. Henry Vanderveer that he wished him to urge his boys up to get married, as there was a large estate coming to them. There is no pretence of the existence of an executed will subsequent to that of August 23d, 1865, and therefore the testator must have been speaking of that will, and could not have understood its contents.

In this disputation we must keep in perpetual view that the will in question crushes the cherished purposes of the testator's life, intentions declared in his own writing through years, and attested by various witnesses in this cause, but by none more emphatically than by Wight, on the very day he prepared the will. He states that the testator, in giving his instructions for the disposal of his estate, said: "I wish to leave it in the Vanderveer name; I wish it called Vanderstadt, and I wish a trustee to hold it forever if he could." Hold it forever, how? Manifestly in the Vanderveer name. Even Dr. Cornell, himself, says, that the testator, shortly before this will was executed, told him, that he was very anxious to transmit his property to "three successive generations." What three successive generations could this mean? generations of Cornells, or generations of Vanderveers? Nothing but utter imbecility of intellect could have extinguished his pride in the Vanderveer name. This testimony should close the controversy as to the cherished purposes of the testator to perpetuate his name by a testamentary disposition, up to, and at the time the will of August 23d was being drawn; did not Dr. Cornell attempt to prove that Dr. Vanderveer subsequently declared another purpose in a memorandum in his own hand, from which the Conover will was drawn, December 7th, 1866, and ask the court to infer from this that the testator's mind had undergone a change since he drafted his earlier wills?

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Simply referring to the fact that no offer or attempt was ever made to execute the Conover will, that no subsequent declaration appears that it embodied his wishes, there can be little doubt that his mind, if ever changed, could not long have withstood his original and long cherished wish to perpetuate the name of Vanderveer through Vanderstadt. Indeed this is not left merely to inference; in Exhibit L, dated May 5th, 1868, found among testator's papers after his decease, he declares a desire, "to dispose of his estate so as to perpetuate it undivided, and transmit his name therewith in perpetuity." Thus it is shown, that as he advanced in life, the desire grew upon him that his name should ever be preserved in the uses to which Vanderstadt was devoted.

With these known purposes existing in the testator's mind for years before, and on the very day of its execution, a paper is propounded as his last will and testament, which, if it does not wholly defeat, effectuates them in a very slight degree. No benefit is conferred upon any Vanderveer, save Lawrence. The property is wholly put into Dr. Cornell's possession, with no words therein limiting his scheme of expenditure in the slightest degree, and so arranged that the proud name of Vanderveer should forever depart from Vanderstadt, after the taste of Dr. Cornell had adorned and beautified it at unlimited expense, unless the strange contingency should happen that Lawrence, a bachelor of thirty-five and still unmarried, should have lawful male issue which shall survive at his own death. How strangely the purposes pronounced in this instrument differ from those which, Wight says, came from the lips of that venerable man on the 23d of August, 1865.

In determining whether this will is the exponent of Dr. Vanderveer's intentions, the acts and declarations of Dr. Cornell and Wight cannot be disregarded. I agree with the learned Chancellor that the declaration of Dr. Cornell that he did not wish to be executor or trustee, is justly subject to criticism. He not only, so far as appears, failed to make the slightest attempt during the three years that the

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testator survived the date of this will, to withdraw from the trust he had accepted by having some one substituted in his place, but with a haste which shows a want of delicacy and propriety, unsuccessfully attempted to have the will proved without the delay required by law. Dr. Cornell's statement to John M. Brown, that he had requested the testator "to remember a member of Dr. Cornell's family in the will;" the fact that both his son and himself are largely benefited by the will; his declaration that he proposed John M. Brown as a testamentary witness, to which the testator objected, when it is not denied that the testator, both before and after this time, showed much confidence in Brown; his statement that he had the will at home sealed up and knew nothing of its contents, except what Wight had told him; his utter inability to have taken a copy of it, if that was true, or to give any plausible account of his purpose in taking such copy; the fact that this will was executed in such haste, and taken away by Dr. Cornell and never again submitted to the testator's consideration, or its entire contents talked about by him; his remark to Israel Harris, that the will was handed to him sealed up and had not been opened, and the distinct statement of Mrs. Alward, that the testator, about one month after this will was executed, said to her that it was his intention that the bulk of his estate should remain in the Vanderveer family; cannot escape the scrutiny of the court, and admonishes us to be careful that we do not defeat the true will of Dr. Vanderveer in our desire to preserve the right of testamentary disposition.

Wight has thrown a suspicion around his testimony by declaring his unwillingness to serve as a witness to the will without taking any subsequent measures to remove himself from a position so disagreeable; and this suspicion is not shaken by his statement of the successful manner in which he had on previous occasions played the character of witness to a will. The interview between the testator and Wight while the will was being drawn, as given by Wight himself, is persuasive evidence to show that the true intentions of Dr.

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Vanderveer found no expression in the instrument then prepared. In Wight's language, the testator wished to leave his estate in the Vanderveer name, he wished it called Vanderstadt, to be held in the name of a trustee for ever. When he told him he could not tie it up longer than two lives in being, he then said he intended to give it to one of the Vanderveer boys for life, and after some hesitation as to which one, he fixed on Lawrence, and believing that he could not tie it up as long as he wished, said it might go to Lawrence's son, if he should have any, or, in default on that side, would give it to Dr. Cornell's eldest son. Where in this will are these instructions carried out? Does this paper pass the estate to Lawrence for life, and then to his son, if he should have any? Far from it; it can scarcely be said to go to Lawrence for life, and it goes to his son only on the doubtful contingency that he survives his father. Wight further says, that the testator hesitated whether to give Lawrence or John the first place in the will, showing that they two occupied the first place in his affections, and yet he most unaccountably, after giving the preference to Lawrence, discards John altogether, and in the position John would have so naturally occupied the name of Dr. Cornell's eldest son is written, of whom he knew so little, and for whom he never before or afterwards had expressed the least regard, not even naming him in the Conover will.

There can be no absolute presumption that a man of testamentary capacity would not execute a will without understanding its contents, for such assumption wholly dispenses with the rule of law that it must appear as a fact that the contents were in some way made known to him.

To the argument so strongly pressed, that Dr. Cornell would not have attempted an imposition which was subject to so many chances of detection by Dr. Vanderveer, it is sufficient to say, that the burden of proof being on the proponent to establish the fact that the contents and purport of the will were in some way made known to the testator when he gave his name to it, the evidence leaves that ques-

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tion in such a state of doubt and improbability that I cannot give my voice to sustain it.

It is proper to say, that it is not intended to intimate any opinion as to the admissibility of the testator's declarations, before and after the execution of the will; they have been used in the argument on both sides without objection, each party claiming a benefit from them. The same remark will apply to substantive evidence, offered to prove the statements of Dr. Cornell before he came on the stand as a witness, and to declarations made by Wight, to which his attention was not called on his cross-examination.

The views here taken dispose of the appeal of Lawrence Vanderveer.

My opinion therefore is, that the decree of the Ordinary should be reversed, and probate of the entire will refused. The decree below having been in favor of the proponent, costs, expenses, and reasonable counsel fees, are to be allowed out of the estate on both sides, in this court, and in the court below, to be settled by the Ordinary.

BEDLE, J.

The paper offered for probate as the will of Dr. Henry Vanderveer, deceased, is dated August 23d, 1865, and purports to appoint the Reverend Frederick F. Cornell as executor, and then bequeaths and devises to such executor all the real and personal estate of the testator, in trust, to take possession and hold the same, and receive the income thereof, with power to sell and convey any of the real estate, except that in Bedminster township, Somerset county, and to invest and re-invest the personal estate as often as shall be necessary; also, to care for the real estate in Bedminster township, to be known as Vanderstadt, and to improve the same as the said trustee shall see fit, devoting any part of the income of the whole estate, necessary for that purpose, and to employ such persons, at such expense, as he may see fit; and also, in further trust, to pay over to Lawrence Vanderveer, a son of Dr. Henry Vanderveer, who (Dr. Vanderveer)

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is a cousin of the testator, the balance of the income of the estate, and at the decease of the said Lawrence, to transfer the whole estate to the lawful male issue of his body, if any him surviving, or in default of such issue male living at the decease of the said Lawrence Vanderveer, then to transfer and convey the same to Frederick F. Cornell, jun., son of the said trustee, to have and to hold to him, his heirs and assigns forever. The alleged testator died May, 1868, leaving personal estate amounting to about \$245,000, and two farms, together containing about 700 acres, one on each side of the north branch of the Raritan; a large part of which he inherited from his father. The deceased was a physician, a bachelor, and at his death was about ninety-one years old. He had no relatives nearer than cousins. Dr. Henry Vanderveer, one of the appellants and the father of Lawrence, being his only cousin on the Vanderveer side, and the appellants, Henry S. Harris, Israel Schenck, John F. Schenck, and Gertrude Griffin, being the only cousins now living (so far as appears from the evidence) upon the side of the mother of the deceased. Besides these, he had relatives more remote, and among them* was Dr. Cornell, who, it seems, was a second cousin through the mother of each. The appellant, Dr. Henry Vanderveer, has three children, Lawrence, John, and Louisa. Lawrence is unmarried, and at the death of Dr. Vanderveer was about thirty-five years of age. The only beneficiaries in being named in the will, are Dr. Cornell, the executor and trustee, with the large powers therein given, Lawrence Vanderveer, whose interest is limited to his life, and Dr. Cornell's son, the latter being entitled to the whole estate should Lawrence leave no male issue him surviving.

The paper was executed at the residence of the deceased. Lawrence was not present; Dr. Cornell was. Besides Dr. Cornell, two others only were present; one, Edwin M. Wight, a lawyer of New York city then living at Somerville, and who was then the partner of Frederick F. Cornell, jun., in the practice of law in New York, and also with him engaged

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in other business quite largely, outside their profession; the other was Samuel Naylor, a miller at the mill of the deceased. Wight and Naylor are the subscribing witnesses, the former having drawn the paper, and both were requested by Dr. Cornell to be present at Dr. Vanderveer's on the day the paper was signed. Dr. Cornell says this was done at the suggestion of Dr. Vanderveer, but the evidence is clear that Dr. Vanderveer had no personal contact with either Wight or Naylor on the subject of his will, till the day they were present at the immediate request of Dr. Cornell. The inmates of Dr. Vanderveer's house usually consisted of some blacks who had lived with him for years, and some of whom were formerly his slaves; and besides those, some relative would, at times, remain with him; sometimes he would have persons hired to keep house for him. On the day in question (August 23d, 1865,) his cousin, Mrs. Griffin, was there, but not present at the drawing or execution of the paper. Dr. Cornell was a frequent visitor at the house of deceased, from June previous up to that time, and usually saw him alone. Wight had gone from Somerville to New York city the morning of August 23d. He left New York at 12 o'clock in company with Dr. Cornell, who had gone to the city for him to go to Dr. Vanderveer's. Dr. Cornell lived also near Somerville; and Wight having dined at Cornell's on their arrival from New York, they both rode some seven miles to Dr. Vanderveer's, reaching there about 4 o'clock, at which time Wight says that he drew the will from instructions obtained from the testator.

Dr. Vanderveer was then eighty eight or nine years of age, with hearing impaired and eye-sight so affected that he could not *see to read*. This inability to read was owing to a temporary trouble with his eyes, which existed for a few weeks, both before and after the paper was signed. Ordinarily he was in remarkable health, and had good eye-sight for one so old, but at this time it is clear that he could not see to read. It is also clear that on the night previous he was taken with a sudden *illness* which severely affected him, and from which he was suf-

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fering, although much relieved, when the paper was signed. He was then so feeble that he had to be helped by Dr. Cornell up to the stand to sign the paper, and then be helped away from it. His mind, although not so feeble as to render him then entirely incapable of making a will with proper assistance, was in such an enfeebled condition, together with his defect of hearing and inability to read, as to make him a very easy victim or subject for undue influence or misunderstanding. He could only depend upon those who surrounded him. Those three were Dr. Cornell, Wight, and Naylor; the latter being only present for a short time as a witness to the formal execution. The paper is produced by Dr. Cornell, and he says it was kept in his safe at his house, from the day it was signed till after Dr. Vanderveer's death. The formal execution is proved by Naylor, without the aid of the other subscribing witness; and under ordinary circumstances, the law presumes from the fact of the signature, that the testator knew the contents. This paper bears the signature of Dr. Vanderveer, made by him in Naylor's presence; but notwithstanding this, does that presumption exist in this case? Naylor says, that Cornell requested him to come up there; that the doctor was about making his will and wanted him to sign it, and that the doctor did not wish it known, and told him to keep it still; that he then went to the doctor's house and into his room; that he was then sitting in a rocking chair; that the doctor recognized him after he spoke to him, but thinks he did not before; that he said he felt better, but last night he thought he was going to step out; that the paper (the will) laid on the table or stand, (thinks the stand,) with a newspaper on the top of it, covering everything but the seal and clause of attestation; that he (Dr. Vanderveer) was sitting about ten or twelve feet from the paper, and Cornell went to him and said, now, doctor, we are ready; that the dominie took hold of him, helped him out of the chair, and kind of led him there; that Wight was standing there by the will; thinks Wight gave him the pen; that Dr. Vanderveer felt on the

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paper, felt the seal, and some one told him that it was right; thinks it was Cornell; that Wight asked him if he acknowledged that to be his last will, but the doctor made no reply; that he went on and said that was his last will and testament, 'to which I affix my name, and is the best I can do under present circumstances;' he said his eye-sight was poor, he said he couldn't see. Naylor also says, that Wight was going to ask him whether that was his last will and testament before he said it, that Wight said something about it, but he went on and said it himself. Whether the question of Wight was heard by Dr. Vanderveer, it appears to me is quite doubtful. Naylor further says, that the doctor signed the will right away on being helped to the stand, and that Cornell helped him away, and that he, Naylor, signed his name while he (the testator) was walking from the table to the chair. He also says, that he thinks Cornell asked him to put his name there as a witness, although he is not certain about that, and he says distinctly, that the will was not read over in his presence. Naylor left the room in five or ten minutes after signing his name, and when he left he thinks Wight was taking the will up and folding it, or doing something with it. Wight says, that when completed he handed the paper to the testator, who said to Dr. Cornell, guess you had better take it, or words to that import. Wight also says, that he drew this paper that day in the room of Dr. Vanderveer, the doctor having first produced a paper in his own handwriting, and in giving the description of it, witness says, it was a draft lacking the essentials of execution to be a will, but could not say whether complete, except for execution, as his attention was called to the earlier part of it; he says that the testator said, you make the first part like that, or words to that effect; the part which he says he copied, being a clause containing his religious faith, (which by the way is a crude mixture), and directing the burial of his body. When asked what became of that draft, he answered on oath: "I have never seen it since, I

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should say I don't know." No such paper in Dr. Vanderveer's handwriting, or any other, has been produced, which is certainly a curious circumstance, as several drafts of wills were found among his papers, in his own writing, and some bearing his signature, but all differing materially from the paper in question.

It is unnecessary to refer to any more of the peculiar circumstances at the time of the execution of this paper. There is already sufficient stated to throw upon the proponent the burthen of showing that the testator was in some way made acquainted with the contents of the paper. The fact of the old age of the deceased, his feebleness, his defective hearing, his inability to read, and the presence about him of an important beneficiary, and also the partner in law business, and otherwise, of the contingent residuary legatee and devisee, brought there at the immediate request of his father, together with the opportunity for fraud, and the suspicious circumstances stated, all fairly and legally require that the proponent should show that Dr. Vanderveer knew the contents of the paper. 1 *Jarman* 45, 49; 2 *Green's Ch.* 549; 3 *Wash. C. C.* 580; 2 *McCarter* 310. This knowledge may be drawn from the reading of the will under such circumstances as to reasonably create the belief that the testator heard it, or from its having been drawn according to his instructions, or from an acknowledgment that it had been read to him, or from other circumstances, which induce the belief that he must have known the contents; the amount and kind of proof depending very much upon the circumstances of each case, and being necessarily relative, according to the degree of capacity, and suspicion of fraud, or doubt of the testator's knowledge of the contents.

The important issue then before us, is of fact exclusively, whether Dr. Vanderveer knew the contents of the paper he signed. It was not very unlike other drafts he had made, so far as Lawrence Vanderveer was concerned,

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but in other respects it was entirely different. How it agreed with the draft Wight says was produced when the paper was signed, we are not informed. The fact of knowledge of its contents, rests upon the testimony of Wight and Cornell alone. With the burthen upon the proponent, under the facts of this case, Naylor fails to prove the paper as the will of Dr. Vanderveer.

The proponent from the testimony of Wight, and his own, seeks to prove that this paper was drawn from certain instructions, in substance given by Dr. Vanderveer, and that after it was drawn it was read to him; and here is the vital part of the case. I shall not refer in particular to the evidence, or its weight in support of that position, nor to that that may bear against it. The facts have been elaborately and most ably argued, and the effect they produce upon the mind need only be stated.

The result as to myself is, that I am not satisfied that Dr. Vanderveer knew the contents of the paper he signed. The evidence has failed to convince me that he did. This conclusion is undoubtedly in conflict with some of the direct evidence, but in examining that, with all the legitimate facts and circumstances of the case, the rules and probabilities of human conduct should not be disregarded. It is not strange that in admitting this paper to probate, the Ordinary should have done it reluctantly, and with much misgiving, as his opinion shows. The question of fact is undoubtedly embarrassing, but my own judgment fails to be satisfied in favor of the proponent, and although the right of disposition by will should be carefully protected by the court, yet in this case, the circumstances have imposed a burthen upon the proponent from which the evidence has not relieved him, and enabled me to say that the paper propounded is the will of the deceased. To this extent only, need this opinion go. Beyond that, a discussion of the evidence is to me undesirable.

The appeal of Lawrence Vanderveer was brought by reason of a suggestion in the opinion of the Ordinary,

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whether certain parts of the will, particularly that in relation to him and his issue, could be admitted to probate to the exclusion of the rest. Although it is quite evident that the deceased had previously expressed an intention in different drafts of wills unexecuted, that Lawrence should have the chief part of his estate for life, yet it in no way appears that his intention was to give him the whole income. By striking out all the clauses, excepting that appointing the executor, and bequeathing and devising the estate to him in trust, with power to receive the income, and invest, and reinvest, and to convey certain real estate, and then to pay over to Lawrence during his lifetime, the balance of the income, and at his decease to transfer the whole estate to his lawful male issue surviving, if any he shall have, it would result in giving Lawrence the whole income of the estate, (deducting the necessary expenses of the executorship and trusteeship) to the exclusion of all others, who also might be expected to be objects of his bounty. I am not satisfied that such was his intention. The paper was evidently drawn as an entirety, and its clauses cannot be separated so as to say, from the evidence, that any one part by itself, was according to the intention of the deceased. This view renders any expression on the validity of Lawrence's appeal unnecessary, or any consideration of the extent to which the court would go in admitting part of a will to probate.

The decree of the Prerogative Court should be reversed.

For reversal—BEDLE, CLEMENT, DALRIMPLE, KENNEDY, OGDEN, VAIL, VAN SYCKEL, WOODHULL. 8.

For affirmance—BEASLEY, C. J., OLDEN, SCUDDER. 3.

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CARLISLE and others, appellants, and COOPER, respondent.

COOPER, appellant, and CARLISLE and others, respondents.

1. The jurisdiction of courts of equity over the subject matter of nuisances, is not an original jurisdiction. It does not arise from the fact that a nuisance exists, but results from the circumstance that the equitable power of the court is necessary to protect the party from an injury for which no adequate redress can be obtained by an action at law, or its interference is necessary to suppress interminable litigation for the recovery of damages for an actionable wrong. As a condition to the exercise of that power it is essential that the right shall be clearly established, or that it should previously have been determined by the action of the ordinary tribunals for the adjudication of the rights of the parties, and the injury must be such in its nature or extent, as to call for the interposition of a court of equity.

2. The rule of the English law requiring the complainant's legal rights to be first established in a court of law, before a court of equity will give relief in cases of nuisance, has been somewhat relaxed. The mere denial of the complainant's right by the defendant in his answer, will not oust the court of its jurisdiction by injunction. So also when the complainant has for a long time been in the undisputed possession of the property or enjoyment of the right with respect to which he complains, and the acts of the defendant which constitute the injury to such property, or the invasion of such right, have been done recently before the filing of the bill, the Court of Chancery will entertain jurisdiction to decide and dispose of the entire litigation, if the evidence does not raise any serious question as to the fact of the existence of the complainant's rights when the bill is filed.

3. Where a complainant seeks protection in the enjoyment of a natural watercourse upon his land, the right will ordinarily be regarded as clear. The mere fact that the defendant denies the right by his answer, or sets up title in himself by adverse user, will not entitle him to an issue before the allowance of an injunction.

4. Where complainant's lands are rendered comparatively worthless by backwater from a dam, and a nuisance is thereby created deleterious to health, and the enjoyment of the premises is thereby impaired, an action of law furnishes no adequate remedy, and the complainant is entitled to the protection of a court of equity by the abatement of the nuisance.

5. Where the complainant's right to the relief sought by the bill is admitted by the answer, and also established in a suit at law, and the sole question of fact in controversy is, whether the defendant has effected an abatement of the admitted nuisance by lowering his dam to the required level, a court of equity is an appropriate tribunal to decide that question.

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There is nothing in the subject matter of such investigation that would entitle the defendant to an issue as of course.

6. The granting or refusing of an issue is a matter of discretion.

7. The power of courts of equity to order the trial of an issue of fact which the court is itself competent to try, ought to be sparingly exercised, and a practice of sending ordinary matters to the decision of a jury ought not to be established. Where the truth of facts can be satisfactorily ascertained by the court, without the aid of a jury, it is its duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law.

8. Mere delay in applying to the court is frequently a ground for denying a preliminary injunction, and is also a reason for courts of equity refusing to take cognizance of a case where there is a remedy at law. But where the legal right is settled, and the more efficacious remedy of a court of equity is necessary to complete relief, delay is no ground for a denial of its aid, unless it is coupled with such acquiescence as deprives the party of all right to equitable relief.

9. A person may so encourage a nuisance as not only to be deprived of the right to equitable relief, but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance. But where a defendant expended money in erecting a dam, and increasing the capacity of his mill, under a verbal agreement with the owner of lands above for the privilege of overflowing his lands for a compensation to be made, and filed a bill after the work was completed for the specific performance of that agreement, and was denied relief, he will be concluded by the decree in that case, and cannot rely on such alleged agreement as a ground for denying relief, on a bill subsequently filed by such owner to enjoin the overflow of his lands and to obtain an abatement of the dam.

10. Where, as the facts were upon the filing of the bill, the complainant was entitled to relief in a court of equity, the defendant cannot defeat complete redress by a partial abatement of the nuisance, upon an insistment that the effects of such portion of the nuisance as still remain, are not of sufficient consequence to entitle the complainant to ask that perfect relief which he was entitled to when he sought his remedy.

11. The extent of the right to flow the lands of another acquired by adverse user, is not determined by the height of the structure of the dam, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription.

12. As a general rule, the height of the dam when in good repair and condition, including such parts and appendages as make its efficient height in its ordinary action and operation, fixes the extent of the right to flow, without regard to fluctuations in the flowage which are due to accidental causes, such as a want of the usual repairs, or the variation in the quantity

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of water in the stream in times of low water or drought, or in the pondage of the dam by its being drawn down by use.

13. There may be such continuity of use of flash boards as that they, in effect, are parts of the permanent structure, and by such user a right to flow by means of a permanent dam to the height of such boards may be acquired, but the occasional use of flash boards for short periods, when little or no injury may be done, as an exception to the general rule not to keep them on, does not amount to the open, uninterrupted, and notorious adverse use necessary to establish a prescriptive right.

14. Prescriptions may be upon condition in restraint of the mode in which the prescriptive right is to be enjoyed, or may have annexed to them a duty to be performed for the benefit of the person against whom the prescription exists.

15. The prescriptive right to the use or flow of water may be qualified as to times, seasons, and mode of enjoyment, by the character of the use from which the right has originated.

16. Where the practice in the use of a dam and its appendages during the period of prescription, has been to control the height of the water in the pond in times of high water by removing the gates and permitting the water to flow off, this mode of user qualifies the right which has been acquired by prescription, and a decree permitting the use of such gates, which requires that they shall be removed in times of freshets and high water, is necessary to restrain the flowage of the complainant's lands to what it was accustomed to be during the time of prescription.

17. A decree which refers to the cap piece of the dam, as fixing the extreme height to which the water may be raised by the use of the gates when shut, though more specific in its direction than is usual, is not objectionable for that reason.

The bill was filed by Eliza Carlisle and others, to ascertain and settle the height at which the defendant, Cooper, was entitled to maintain his dam; and to enjoin the defendant from overflowing the complainants' lands with back-water from the dam of the defendant. The facts of the case sufficiently appear in the opinion of the Chancellor, reported in 4 *C. E. Green* 257.

Both parties appealed from the Chancellor's decree, and the appeals were argued together.

Mr. Pitney, for Carlisle and others.

Mr. Vanatta and *Mr. Shipman*, for Cooper.

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The opinion of the court was delivered by

DEPUE, J.

The counsel of the defendant, as a preliminary matter, submitted to the court the question, whether the Court of Chancery has jurisdiction to try the question of nuisance or no nuisance, involved in this cause.

Upon the abstract question, whether a court of equity has jurisdiction over nuisances, whether they come within the class of public or of private nuisances, very little need be said. Whatever contention there is at the bar, or disagreement among judicial minds, as to the principles on which that jurisdiction should be administered, there is no room for controversy that such jurisdiction pertains to courts of equity. It is a settled principle that courts of equity have concurrent jurisdiction with courts of law in cases of private nuisances; the interference of the former in any particular case being justified, on the ground of restraining irreparable mischief, or of suppressing interminable litigation, or of preventing multiplicity of suits. *Angell on Watercourses*, § 444; 2 *Story's Eq. Jur.*, § 925; *The Society v. The Morris Canal Co.*, *Saxt.* 157; *Scudder v. Trenton Del. Falls Co.*, *Saxt.* 694; *Burnham v. Kempton*, 44 *New Hamp. R.* 79.

The doctrine of the English courts is, that the jurisdiction of courts of equity over nuisances, not being an original jurisdiction for the purpose of trying a question of nuisance, but being merely a jurisdiction in aid of the legal right for the purpose of preserving and protecting property from injury pending the trial of the right, or of giving effect to such legal right when it has been established in the appropriate tribunal, the court will not, as a general rule, entertain jurisdiction to finally dispose of the case, where the right has not been previously established and is in any doubt, and the defendant disputes the right of the complainant or denies the fact of its violation. Under such circumstances the court will, ordinarily, do nothing more than preserve the property in its present condition, if that be

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necessary, until the question of right can be settled at law. *Semple v. The London and Birmingham R. R. Co.* 1 *Eng. Rail. Cas.* 120; *Blakemore v. The Glamorganshire Canal Navigation*, 1 *Myl. & Keen.* 154; *Broadbent v. Imperial Gas Co.*, 7 *DeG. M. & G.* 436; *S. C., on Appeal*, 7 *H. of L. Cases* 600; *Elmhirst v. Spencer*, 2 *Mac. & G.* 45; *Kerr on Injunctions* 332, 340; 2 *Story's Eq.*, § 925 b; *Angel on Watercourses*, § 452.

It is said in the ninth edition of Story on Equity Jurisprudence, that in the American courts the rule of the English law requiring the complainant's legal rights to be first established in a court of law before a court of equity will give relief, has, in general, not been enforced in its strictness. 2 *Story's Eq.*, § 925 d. In our own state it has been somewhat relaxed. The mere denial of the complainant's right by the defendant in his answer, will not oust the court of its jurisdiction by injunction. *Shields v. Arndt*, 3 *Green's Ch.* 235; *Holsman v. Boiling Spring Bleaching Co.*, 1 *McCarter* 335. So also, when the complainant has for a long time been in the undisputed possession of the property or enjoyment of the right with respect to which he complains, and the acts of the defendant which constitute the injury to such property or the invasion of such right, have been done recently before the filing of the bill, the Court of Chancery has entertained jurisdiction to decide and dispose of the entire litigation. The language of Chancellor Pennington on this subject in *Shields v. Arndt*, has been very generally approved, and the principle he states has been adopted by the courts of this state. He says: "It was not so much against the general jurisdiction of the court that the objection is raised, as to its exercise when the defendant, as in this case, denies the complainant's right. It is the province of this court, as the defendant's counsel insist, not to try this right, that belonging alone to a court of law, but to grant the possession whenever that right has been ascertained and settled. If it be intended to say that a defendant setting up this right by his answer, thereby at

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once ousts this court of jurisdiction, I cannot assent to it, for it would put an end very much to the exercise of an important branch of the powers of the court. . . . If it be intended to go no further than that it is a question which should be sent to law in cases of doubt, and often should, before injunction, be first there established by trial and judgment, then I agree to the proposition. A long enjoyment by a party of a right, will entitle him to restrain a private nuisance, even though the defendant may deny the right, and the court will exercise its discretion whether to order a trial at law or not, always inclining to put the case to a jury if there be reasonable doubt."

The decree in that case was against the complainant, on the ground that he had not established by the proofs in the cause his right to the stream in question, as an ancient water-course. On appeal to the senate, sitting as a court of appeal, the decree was reversed by a vote of eleven to seven, and a perpetual injunction was decreed. *Minutes of Court of Errors and Appeals, June 19th, 1844.*

In *Shields v. Arndt*, the complainant had been in the enjoyment of the flow of water upon his land without interruption, until just before the bill was filed. In the other cases in which chancery has granted relief on final decree, by injunction, the complainant was either in the full enjoyment of the right, which was protected from threatened invasion, when the bill was filed, or his right originally was not disputed, and its continued existence was clearly established at the hearing, and the act of the defendant, which interrupted the enjoyment of it, had been done within a recent period before the bill was filed. *Robeson v. Pittenger*, 1 *Green's Ch.* 57; *Brakely v. Sharp*, 2 *Stockt.* 206; *Earl v. De Hart*, 1 *Beas.* 280; *Holsman v. Boiling Spring Bleaching Co.*, 1 *McCarter* 335; *Del. and R. Canal Co. v. Raritan and Del. Bay R. R. Co.*, 1 *C. E. Green* 321; *S. C., on Appeal*, 3 *C. E. Green* 546; *Morris Canal and Banking Co. v. Central R. R. Co.*, 1 *C. E. Green* 419.

In *Holsman v. The Boiling Spring Bleaching Company*,

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the bill was filed to enjoin the defendants from polluting a stream, which flowed in its accustomed channel through the lands of the complainants. The defendants were incorporated in the year 1859, for the purpose of carrying on the business of bleaching and finishing cotton and woollen goods, and soon after became the owners of a tract of land, pond, and mill premises above the lands of the complainants, and erected thereon a large mill and works, which were put in operation in the summer of 1860. The bill charged, that in the fall of 1860, in consequence of large quantities of chemical matter and other impurities discharged from the defendants' works into the stream, the water was filled with offensive matter, discolored and polluted, and rendered unfit for domestic purposes, producing offensive odors, which infected the air of the neighborhood, and penetrated the dwelling, so that the complainants were compelled to refrain from all use of the water for family or other purposes; by reason whereof, they were unable to use or enjoy their said property as they had been accustomed, and of right ought to do, or to sell the same at a fair price. The bill was filed on the 5th day of February, 1861. The defendants in their answer did not deny the erection of their works, or the discharge of chemicals and other matter therefrom into the stream, but insisted that the nuisances of which the complainants complained were not occasioned thereby, but by other causes. They further alleged that the lands and mill site used and occupied by them, had been used and occupied as a mill site for more than twenty years, and that the business of fulling and dyeing had been there carried on for more than that period of time, and that they had thereby required a prescriptive right to use said stream for manufacturing purposes, although the same might taint and discolor the water. The cause was brought to a hearing on the pleadings and evidence, and the Chancellor decreed a perpetual injunction. That the water in the stream upon the complainants' land had, since the erection of the defendants' works, become discolored, polluted, and unfit for domestic or

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ornamental purposes, and that the complainants' premises had thereby been rendered uncomfortable, inconvenient, and undesirable, for the purposes for which they were designed and used, were not denied by the answer, and were fully established by the evidence. The Chancellor decided, that where a complainant seeks protection in the enjoyment of a natural watercourse upon his land, the right will ordinarily be regarded as clear, and that the mere fact that the defendant denies the right by his answer or sets up title in himself by adverse user, will not entitle him to an issue before the allowance of an injunction. With respect to the defendants' claim of a prescriptive right to pollute the waters along the complainants' lands, he examined the evidence, and found that although the mill site occupied by the defendants may have been used for the purpose of dyeing for the period of twenty years, there was no evidence in the cause that the materials discharged into the stream, anterior to the erection of the defendants' works, were such in character or quantity as to pollute the waters in front of the complainants' lands, and that consequently there was no proof whatever of any adverse user in the defendants, or those under whom they claimed. In this aspect of the evidence touching the adverse right set up by the defendants, this case, like those which preceded it, is an illustration of the practice of the courts of equity of this state to take complete cognizance of matters of nuisance, where the complainant has previously been in the undisputed enjoyment of a right, and the bill is filed promptly upon the commission of the act of interference with such right, and the evidence does not raise any serious question as to the fact of the existence of the complainants' right when the bill is filed. That it was not intended to assert the power of the Court of Chancery to ultimately dispose of questions of nuisance, without regard to the state of the evidence bearing on the question as to the existence of the complainants' right, and the situation of the parties previous to the filing of the bill, is shown by the remarks of the Chancellor in his opinion as

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to the necessity that the party's right should be clear to entitle him to the remedy by injunction in cases of private nuisance, as well as by the opinion of the same Chancellor, in the case of the *Zino Co. v. The N. J. Franklinite Co.*, 2 *Beas.* 322, in which he expresses his repugnance to deciding a question of right in real property, where the defendant was in possession, and a real controversy arose as to the superiority of the titles of the respective parties, a repugnance which was only overcome by the fact that no motion had been made to dissolve the preliminary injunction, and that both parties were desirous that the question of the rights of the parties should be decided. The same doctrine has repeatedly been enunciated by the courts of this state, as the controlling principle by which the Court of Chancery is guided in exercising its undoubted jurisdiction over the subject of private nuisances. *Scudder v. The Trenton Delaware Falls Co.*, *Saxt.* 694; *Southard v. The Morris Canal Co.*, *Id.* 519; *Shreve v. Voorhees*, 2 *Green's Ch.* 25; *Outcalt v. Disborough*, *Id.* 214; *Hulme v. Shreve*, 3 *Green's Ch.* 116; *Shreve v. Black*, *Id.* 177; *Cornelius v. Post*, 1 *Stockt.* 196; *Wolcott v. Melick*, 3 *Stockt.* 204; *Haight v. The Morris Aqueduct Proprietors*, 4 *Wash. C. C.* 601.

The principle supported by these cases was not impaired by the decision of this court, in *The Morris and Essex R. Co. v. Prudden*, 5 *C. E. Green* 530. In that case the appeal was from an order of the Chancellor for a preliminary injunction, on depositions taken under a rule to show cause. The premises on which the defendants were about to lay their track, were within the limits of an old turnpike which had been vacated under legislative authority to enable the defendants to use a part of the same for their purposes; on the faith of which they acquired the title to the fee, and for twenty years had occupied it for a single track, and other purposes connected with their business. The right of the complainant for the protection of which the bill was filed was not all clear, and the injury on which he based his

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claim to equitable relief was slight, and the injunction stopped an important public work. As already observed, the jurisdiction of courts of equity over the subject matter of nuisances is not an original jurisdiction. It does not arise from the fact that a nuisance exists, but results from the circumstance that the equitable power of the court is necessary to protect the party from an injury, for which no adequate redress can be obtained by an action at law, or its interference is necessary to suppress interminable litigation, for the recovery of damages for an actionable wrong. As a condition to the exercise of that power, it is essential that the right shall be clearly established, or that it should previously have been determined by the action of the ordinary tribunals for the adjudication of the rights of the parties, and the injury must be such, in its nature or extent, as to call for the interpositon of a court of equity.

In the case now under consideration the defendant had been in the use of his dam, as it was at the time of the filing of the bill, since 1853, unmolested by the complainants, or their ancestor, until 1861, when the first of the actions at law was brought. It is therefore insisted by the defendant's counsel, that the suit is prosecuted not for relief in aid of a legal right, but for establishing a legal right, the appropriate tribunal for the determination of which is a court of law. But the decisive answer to this position of counsel lies in the fact, that the right of the complainants at the time of the filing of the bill, and the invasion of those rights by the defendant, are admitted by the answer. The bill alleges the seisin of the farm in question by the complainants, and that the same bounds on Black river, which from time immemorial had been used and accustomed to flow and run by and along the said farm in its natural and accustomed channel, free and clear of all obstructions whatever, and that prior to 1846 the flow of the said river along the complainants' said farm was not in anywise affected by the defendant's dam, or the pondage thereof. The charge is, that the defendant in October or November,

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1846, increased the height of his dam and its appendages, the exact amount of such increase being unknown to the complainants, and that since that time the farm of the complainants has been overflowed by water backed upon it by the defendant's dam. The bill was filed on the 17th of September, 1866. The answer was filed on the 28th of November, 1866. In it the seisin of the complainants of the farm was admitted. It was also admitted that the efficient height of the dam was increased in 1846, and that thereby the backwater on the complainants' farm was increased. The insistment was, that the increase in the height of the dam in 1846, was only nine inches, and that on the 23d of November, 1866 (two months after the filing of the bill) the defendant had reduced his dam nine inches, whereby its efficient height was made what it was before 1846. Upon this branch of the case, the defendant put his defence on the ground that having complied with the object of the bill, there was no reason for continuing the litigation.

Furthermore, at the time of the filing of the bill, two suits at law brought by Eliza Carlisle, one of the complainants, and who was in possession, were pending against the defendant, to recover damages for injuries sustained by reason of the overflow of these lands, by the raising of the dam in 1846. One of these suits was brought in 1861, the other in 1866. These causes having been taken down for trial to the Morris circuit, at the Term of January, 1867, the defendant relinquished his plea to one of the counts of the declaration in each case, in which such injury was complained of, and confessed the cause of action, and submitted to pay substantial damages. Judgments were accordingly entered for the plaintiff in those suits on the 6th of June, 1867, transcripts whereof were made exhibits in this cause.

The extent to which the complainants were entitled to have the defendant's dam reduced, in order to effect an entire abatement of the nuisance, could not be settled by an ordinary action at law for overflowing the complainants' land. The facts necessary to fix the proper measure of such

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relief could only be ascertained by the verdict of a jury, upon an issue specially framed for that purpose.

The complainants' right to such relief as is sought by the bill, being admitted by the answer, and also having been established in the suit at law, the sole question of fact in controversy was, whether the defendant had effected an abatement of the admitted nuisance by lowering his dam to its level before the increase of 1846. The inquiry necessary to decide that controversy, may be made in the Court of Chancery; at least there is nothing in the subject matter of that investigation, that, by established rules of equity procedure, would entitle the party to an issue as of course. Even in the case of an heir-at-law, who is entitled to an issue as a matter of course, when the controversy is as to the *factum* of a will, if he does not dispute the will, but merely denies that certain portions of the land passed by the words of description, a court of equity has full jurisdiction to determine the question thus raised without granting an issue, or may grant such issue at its discretion. *Ricketts v. Turquard*, 1 *H. of L. Cas.* 472. A court of equity has jurisdiction to ascertain and determine the rights of parties under a reservation, in a grant of a water privilege, of so much water "as is necessary for the use of a forge, and two blacksmiths' bellows," without requiring the right to be settled at law. *Olmsted v. Loomis*, 5 *Seld.* 423.

In *Broadbent v. The Imperial Gas Company*, which was before Vice Chancellor Wood (2 *Jurist N. S.* 1132), and afterwards before Lord Chancellor Cranworth, (3 *Jurist N. S.* 221, 7 *DeG., M. & G.* 436), and subsequently before the House of Lords (5 *Jurist N. S.* 1319, 7 *H. of L. Cas.* 600), the complaint was that the complainant, who was a market gardener, was injured by a nuisance arising from the manufacture of gas by the defendants, on the premises adjoining his garden. The complainant, in 1854, brought his action at law to recover damages for such nuisance. The cause came on for trial before Lord Chief Justice Jervis, and by consent was referred to Sergeant Channel to settle the amount of damage

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(if any) which had been occasioned, with power to order what, if any thing, should be done between the parties. In January, 1856, the arbitrator reported the amount of damages, for which judgment was entered, but he failed to make any report as to what should be done by the defendants to obviate the injury to the plaintiff. In May, 1857, a bill was filed by Broadbent to enjoin the company from continuing the nuisance. The Vice Chancellor decreed a perpetual injunction. This decree was affirmed on appeal by Lord Chancellor Cranworth, and was sustained on appeal by the House of Lords. It appeared in evidence that after the submission in 1854, and before the date of the award, alterations had been made in the works, which, it was insisted, made the award as to the state of things in 1854 no longer conclusive as to the state of things in 1856, and the objection was taken that no relief could be obtained by injunction until the fact whether, under the existing condition of the defendants' works, a nuisance was created, was attained by the verdict of a jury. The objection was overruled. In moving the judgment of affirmance, Lord Chancellor Campbell says: "It is said that a new trial was necessary here, because there had been some alterations. That there had been some alterations after the submission, is proved. I consider that that is a point upon which it is for an equity judge to form his opinion. If there has once been a trial at law, and the plaintiff's right has been established at law, I think it is for the equity judge to determine, when the application is made for the injunction, whether the nuisance continues or whether it has been abated; and if he is of opinion that it has not been abated, but that it still continues, then it is his duty to grant an injunction. It seems to me very strange to contend that because a party who commits a nuisance chooses to make some alteration, even although he may do it *bona fide*, it is to be laid down as a rule that there must be another trial, and that *toties quoties* as often as the parties shall make any alteration there must still be another trial. I think the Vice Chancellor did well in investigating whether

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the nuisance continued, and that it was quite unnecessary for him to order a second trial in order to try a fact which had been already investigated and established." Lord Kingsdown, in expressing his concurrence, is equally explicit. His language is: "I perfectly admit that if it could have been shown, upon the application for the injunction, that alterations had been made which had had the effect of removing the evil which the plaintiff had complained of in the action, he would, of course, not have obtained any injunction. But I am not at all prepared to admit that the court was bound to ascertain that fact by directing the trial of an action at law. It remained for the party who resisted that application to show that those alterations had been made which were effectual for the purpose; and if the court, upon the evidence, had reasonable doubt upon that subject, it might, for the information of its conscience, have directed a trial; but it was equally competent to it, and in my opinion it was its duty, if it saw, upon the examination of that evidence, that the evil had not been diminished, to act upon that conviction, and to grant the injunction which it actually did grant."

The case, from the opinions in which these extracts have been taken, is the same as that now before the court, except that this case is strengthened by the fact that the nuisance complained of is admitted by the answer, and the alterations which are claimed to have removed it were made after the bill was filed.

It was further urged upon the argument with much earnestness, that although it might be competent for the court to determine the question in controversy, yet that, under the circumstances of this case, an issue should have been allowed for the determination of the disputed facts by the verdict of a jury.

The power of courts of equity to order the trial of an issue of fact which the court is itself competent to try, ought to be sparingly exercised, and a practice of sending ordinary matters to the decision of a jury, ought

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not to be established. Where the truth of facts can be satisfactorily ascertained by the court without the aid of a jury, it is its duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law. But in cases where the evidence is so contradictory as to leave the decision of a question of fact in serious doubt, and superior advantages of testing the credit of witnesses by *viva voce* examination in open court, and of applying the facts and circumstances proved in the cause to the decision of disputed points, may be obtained by means of a trial before a jury, it is proper that an issue should be awarded. *Trenton Banking Co. v. Woodruff*, 1 *Green's Ch.* 118; *Miller v. Wack*, *Sart.* 205; *Bassett v. Johnson*, 2 *Green's Ch.* 417; *Hildreth v. Schillinger*, 2 *Stockt.* 196; *Lucas v. King*, *Id.* 277; *Fisler v. Porch*, *Id.* 242; *Black v. Lamb*, 1 *Beas.* 108; *S. C.*, nomine *Black v. Shreve*, 2 *Beas.* 455; 2 *Daniell's Ch. Pr.* 1086, 1285; *Short v. Lee*, 2 *Jac. & Walker* 465; *Dexter v. The Providence Aqueduct Co.* 1 *Story's R.* 387; *Dale v. Roosevelt*, 6 *Johns. Ch.* 255; *Hammand v. Fuller*, 1 *Paige* 197; *Apthorp v. Comstock*, 2 *Paige* 482; *Townsend v. Graves*, 3 *Paige* 453.

The granting or refusing an issue is a matter of discretion, and no application was made to the Chancellor for an issue. The case of *Carlisle v. Cooper*, 3 *C. E. Green* 241, in which the question of jurisdiction was raised, was not between these parties. The subject matter of the controversy there, was the dam complained of in this case, but the complainant in that cause was John D. G. Carlisle, and the application to the Chancellor was not an application for a feigned issue. In the answer in this case, the defendant, after stating the abatement of his dam nine inches, submits and insists "that if the complainants shall insist that the defendant has not reduced his dam to the height it was prior to the year 1846, and insists upon trying that question in this honorable court, that this honorable court is not the appropriate tribunal in which to try and decide that question." A replication was filed, and the parties proceeded to

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take their evidence. A court of equity is an appropriate tribunal to decide that question. The case was submitted to the Chancellor for decision on its merits, without objection to the mode of trial. The submission of it to him without applying for an issue, concludes the parties from objection now to the mode of trial. *Belknap v. Trimble*, 3 *Paige* 577.

The position was also taken, that the complainants had lost their right to relief by long delay. Mere delay in applying to the court is frequently a ground for denying a preliminary injunction, and is also a reason for courts of equity refusing to take cognizance of a case, where there is a remedy at law. But where the legal right is settled, and the more efficacious remedy of a court of equity is necessary to complete relief, delay is no ground for a denial of its aid, unless it is coupled with such acquiescence as deprives the party of all right to equitable relief. A person may so encourage another in the erection of a nuisance, as not only to be deprived of the right of equitable relief, but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance. *Williams v. Earl of Jersey*, 1 *Cr. & Ph.* 91. So a party who knowingly, though passively, encourages another to expend money under an erroneous opinion of his rights, will not be permitted to assert his title, and thereby defeat the just expectation upon which such expenditure was made. *Dann v. Spurrier*, 7 *Ves.* 231; *Rochdale Canal Co. v. King*, 2 *Sim. N. S.* 78; *S. C.*, on final hearing, 21 *Eng. L. & Eq* 178; *Ramsden v. Dyson*, *L. R.* 1 *H. of L.* 140; *Dawes v. Marshall*, 10 *C. B., N. S.*, 697; *Wendell v. Van Rensselaer*, 1 *Johns. Ch. R.* 354; *Ross v. The E. & S. R. R. Co.*, 1 *Green's Ch.* 422; *Hulme v. Shreve*, 3 *Green's Ch.* 116; *The Morris and Essex R. Co. v. Prudden*, 5 *C. E. Green* 531; *The Raritan Water Power Co. v. Veghte*, 6 *C. E. Green*, ante p. 463. The defendant's case is not within either of these principles. He did not make his expenditure in erecting his dam, and increasing the capacity of his mill, either

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upon the encouragement of the complainants' ancestor, or under an impression that he had the right to cast the water back to the extent it was held by his dam. He knew that by so doing he would interfere with the complainants' farm. He claims that he obtained that privilege from the complainants' ancestor, under a verbal agreement that he was to be permitted to flow as much of his lands as he, the defendant, saw fit, if he paid him therefor at the same rate as the defendant paid one Horton for lands on the opposite side of the stream. Upon such alleged agreement the defendant sought his remedy after the actions at law were brought, by a bill for its specific performance, and was denied relief. *Cooper v. Carlisle*, 3 C. E. Green 525. The adjudication and decision of that question in that case concludes the rights of these parties.

The damages paid by the defendant in the two suits at law, amounted to \$500. The injury done to the farm of the complainants by the backwater, rendered a part of their land comparatively useless, and the evidence shows that a nuisance was created on it deleterious to health, and that the enjoyment of the premises was thereby impaired. For such injuries an action at law furnishes no adequate remedy, and the party enjoined is entitled to the protection of a court of equity by abatement of the nuisance. *Holsman v. The Boiling Spring Bleaching Co.*, 1 McCarter 335; 2 Story's Eq. Jur., § 926.

As the facts were when the bill was filed, the nature and extent of the injury sustained by the complainants were such as to entitle them to relief in a court of equity, and it would be an extraordinary proposition, that a defendant after the institution of the suit for such relief, should be enabled to defeat complete redress by a partial abatement of the nuisance, thus mitigating but not removing the evil, upon an insistment that the effects of such portion of the nuisance as still remained, were not of sufficient consequence to entitle the complainant to ask that perfect relief which he was entitled to when he sought his remedy.

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The prayer of the bill is, that the exact amount of the increase in the height of the dam in 1846 may be ascertained, and that the defendant may be ordered and decreed to abate said dam, and reduce it to its original height, as it was prior to the year 1846, and remove the obstructions caused thereby to the flow of the river; or that the same may be abated and reduced in height under the directions of the court. The complainants are entitled to the relief prayed for.

The appeal upon the merits, raises the question whether the relief which was granted by the Chancellor, is such as is warranted by the evidence.

The exact import of the decree is, that the defendant is entitled to maintain his dam at the height of the present stone work, and the mudsill thereon, and the sheathing, with the right to place on the mudsill, for the whole length thereof, moveable gates of plank of the width of seven inches, reaching a line nine inches above the said mudsill, and no higher; and that by means of these contrivances the defendant shall be entitled to use the water of said river, subject to the obligation in times of freshets or high water, to so raise the said gates as that the surface of the water shall not be raised above a line drawn twelve and a quarter inches above the top of the mudsill.

The dam was built originally in 1827. It then consisted of a stone wall with a sill upon it, and was about thirty-six feet long. In 1828 or 1829, the superstructure was increased by the addition of posts twelve inches long, with a cap piece on the top nine inches wide. The space between the cap piece and the sill, at each end, was boarded up tight. The rest of the space was occupied by gates nine or ten inches wide, leaving a space between the top of these gates and the underside of the cap, through which the water flowed under the cap piece. In 1846 it is admitted that the structure of the dam was raised, and in 1852 changes were made which increased its power of retaining and throwing back the water. In 1866, when the bill was filed, the super-

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structure consisted of a sill nine inches in height, on which were set posts twenty-one inches high, on which was placed a cap piece nine inches in height, and the space between the sill and cap piece was closed by solid planking at each end, and moveable gates in the intermediate space, thus making the efficient height of the superstructure above the stone wall, thirty-nine inches. It was reduced nine inches in 1866, leaving its present height thirty inches, and the decree of the Chancellor directs a further reduction of twelve inches, reducing the height of the superstructure above the stone wall to eighteen inches, which consists of the height of the sill of nine inches, and the height of the sheathing and gates upon it of nine inches additional. The effect of these operations will be to reduce the height of the dam, including the stone wall, sheathing, sill, and gates, to about what it was originally in 1828, including the stone wall, sill, and gates, which then made up the dam, but without taking into account the fact that the solid planking between the cap piece and the sill at each end, joined close up to the cap piece.

The principle of law stated by the Chancellor, that the extent of the right acquired by adverse user is not determined by the height of the structure, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription, rests upon sound reasoning, and is supported by authority. *Angell on Watercourses*, §§ 224, 379; *Burnham v. Kempton*, 44 *New Hamp. R.* 78. The introduction into the rule requiring continuity of enjoyment to acquire a prescriptive right, of the qualification of habitual use, as applied to the effect of the structure, is the only qualification that is permissible where the easement is such that its enjoyment is profitable only from a continuous use, as an easement to overflow lands.

That the degree of flowage upon the lands of another fixes the extent of the right, is shown by a variety of cases.

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The owner of the easement is not bound to use the water in the same manner, or to apply it to the same mill. He may make alterations or improvements at his pleasure, provided no prejudice thereby arises to the owner of the servient tenement, in the increase of the burden upon his land. *Luttrell's case*, 4 *Rep.* 87; *Sanders v. Norman*, 1 *B. & Ald.* 258. So it is not necessary that the dam should have been maintained for the whole period upon the same spot, if the extent of flowage is at all times the same. *Davis v. Brigham*, 29 *Maine* 391; *Stackpole v. Curtis*, 32 *Maine* 383. A change in the mode of use or the purpose for which it is used, or an increase in capacity of the machinery which is propelled by the water, will not affect the right, if the quantity used is not increased, and the change is not to the prejudice of others. *Angell on Watercourses*, §§ 228, 229, 230; *Hale v. Oldroyd*, 14 *M. & W.* 789; *Baxendale v. McMurray*, *L. R.* 2 *Ch. App.* 790; *Casler v. Shipman*, 35 *N. Y.* 533; *Whittier v. Cocheco Manufacturing Co.*, 9 *New Hamp. R.* 455; *Washb. on Easem.* 279, § 38; *Hulme v. Shreve*, 3 *Green's Ch.* 116.

The rule is clearly stated by Chancellor Green in the *Holsman case*, thus: "Where an action is brought for overflowing the plaintiff's lands by backwater from the defendant's mill dam, it establishes no title by adverse enjoyment, to prove that the defendant's mill has been in existence over twenty years, or that the dam has been in existence for that period. The question is not how high the dam is, but how high the water has been held, whether it has been held for twenty years so high as to affect the land of the plaintiff as injuriously as it did at the time the action was brought."

As a general rule, the height of the dam when in good repair and condition, including such parts and appendages as make its efficient height in its ordinary action and operation, fixes the extent of the right to flow, without regard to fluctuations in the flowage which are due to accidental causes, such as a want of the usual repairs, or the variation in the quantity of water in the stream in times of low

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water or drought, or in the pondage of the dam by its being drawn down by use. *Washb. on Easem.* 105, § 54; *Cowell v. Thayer*, 5 *Metc.* 253; *Jackson v. Harrington*, 2 *Allen* 242; *Wood v. Kelly*, 30 *Maine* 47. But an user to be adverse must be under a claim of right, with such circumstances of notoriety as that the person against whom the right is exercised may be made aware of the fact, so as to enable him to resist the acquisition of such right before the period of prescription has elapsed. *Cobb v. Davenport*, 3 *Vroom* 369. Occasional use of flash boards for short periods, when little or no injury may be done, as an exception to the general rule not to keep them on, does not amount to the open, uninterrupted, and notorious adverse use necessary to establish a prescriptive right. *Pierce v. Travers*, 97 *Mass.* 306. If used for the full period of twenty years, only during times of low water, a prescriptive right will not be acquired thereby to keep the water up to the height of such boards during the whole year. *Marchly v. Shults*, 29 *N. Y.* 346. There may be such continuity of use of flash boards as that they in effect are part of the permanent structure, and by such user a right to flow by means of a permanent dam, to the height of such boards may be acquired. Whether the user has been such as to establish the right, is a question of fact for the jury. *Noyes v. Silliman*, 24 *Conn.* 15.

In the dam of 1828 there were two gates, each fourteen feet long, and the solid planking between the mud sill and the cap piece occupied four feet at each end. The difference between the superstructure of the dam of 1828, in its effect in flowing the lands of the complainants, and that ordered by the Chancellor in his decree, is quite inconsiderable. But with respect to the condition of the superstructure of the dam, and the mode of its use between 1828 and 1846, and from 1846 to 1853, there is great contrariety in the evidence. The conflict relates to the use of boards to close up the space between the top of the gates and the cap piece, thus making the top of the cap piece the line of the tumble; to

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the washing away of the superstructure of 1828, and its being replaced by a structure of a different construction; to the use of gates of variable widths, and at time of nothing more than boards upon the sill, kept in place by pegs and starts. With this conflict in the evidence the case was submitted to the Chancellor on its merits.

The evidence touching the extent of the prescriptive right to flow the lands of the complainants by means of the permanent structure of the dam and moveable gates, and also to the use of flash boards, is reviewed by the Chancellor. His conclusion is, that there is not sufficient proof of an use of the flash boards in such a definite manner, or at certain fixed times or occasions, as to establish a qualified right to use them, when they operate to raise the water to any extent on the land of the complainants, and that the right to maintain the permanent structure of the dam, and to raise the water upon the complainants' lands by the use of the gates, is such as I have mentioned as the substance of the decree.

It is not proposed to examine the evidence in detail; a portion of it has been referred to by the Chancellor in his opinion. It is sufficient to say that his conclusions on all these points are supported by direct testimony, and are consistent with the collateral facts proved, and in my judgment are sustained by the weight of the evidence in the cause.

Objection was made to that portion of the decree which provided for the raising of the gates in times of freshets and high water. As the prescriptive right to the use or flow of water originates from its accustomed use, the right may be qualified as to times, seasons, and mode of enjoyment, by the character of the use from which the right has originated. *Angell on Watercourses*, §§ 382, 222, 224; *Bolivar Manf. Co. v. Neponset Manf. Co.*, 16 *Pick*, 241; *Marcy v. Shults*, 29 *N. Y.* 346; *Burnham v. Kempton*, 44 *New Hamp. R.* 78. Prescriptions may be upon condition in restraint of the mode in which the prescriptive right is to be enjoyed, or may have annexed to them a duty to be performed for the

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benefit of the person against whom the prescription exists. *Kenchon v. Knight*, 1 *Wils.* 253; *S. C.*, 1 *W. Bl.* 49; *Brook v. Willett*, 2 *H. Black.* 224; *Gray's Case*, 5 *Rep.* 79; *Lovlace v. Reynolds*, *Cro. Eliz.* 546, 563; *Colton v. Smith*, *Cowp.* 47; *Paddock v. Forrester*, 3 *Man. & G.* 903.

In the lease to Thompson for the year 1829, the defendant inserted a covenant requiring the tenant to hoist the gates in time of high water, if need be, so that no damage should be done. Similar covenants are contained in subsequent leases, and the evidence is, that it was the uniform practice of the tenants in the use of the dam and its appendages, to control the height of the water in the pond in times of high water, by raising the gates and permitting it to flow off. Like the use of flash boards, only in times of low water, this mode of user qualifies the right which the defendant acquired from user, and the portion of the decree which regulates the management of the gates, is necessary to restrain the flowage of the complainants' lands to what it was accustomed to be during the time of prescription.

In *Robinson v. Byron*, the injunction was to restrain the defendant from using dams, weirs, shuttles, flood gates, or other erections, otherwise than he had done before the 4th of April, 1785, so as to prevent the water flowing to the complainant's mill in such regular quantities as it had ordinarily done before the said 4th of April. 1 *Brown's C. C.* 588. A decree of a like nature was made by Lord Eldon, in *Lane v. Newdigate*, 10 *Ves.* 192.

The decree, by its reference to the cap piece as fixing the extreme height to which the water may be raised by the use of the gates when shut, is probably more specific in its direction than is usual; but it removes all uncertainty in the adjudication of the court as to the extent of the rights of the respective parties. The complaint that the exercise of the defendant's right to the water is thereby made impracticable, is without foundation. That it might be more conveniently exercised if his right was enlarged, is no reason why it should be enlarged by the sacrifice of the rights of the complainants without compensation.

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The objection that the decree fixes the form and construction of the dam perpetually, seems to me to be of greater force. The expression in the decree on which this objection is founded, was probably used through inadvertence. Let the decree be amended by declaring the defendant's rights, as therein in substance declared; and directing the abatement of so much of the present dam as the Chancellor has declared to be unlawful.

The plea of the complainants is based on the allegation that the stone work of the dam was raised by the defendant in 1846. The Chancellor decides that it was not, and he is supported in this by the clear weight of the evidence.

With the exception of the formal modification above mentioned, the decree is affirmed in all respects. Both parties having appealed, and neither party succeeding on the appeal, the affirmance is without costs to either in this court.

The decree was affirmed by the following vote :

For affirmance—BEDLE, CLEMENT, DEPUÉ, OGDEN, SCUDDER, VAN SYCKEL, WALES, WOODHULL. 8.

For reversal—VAIL.

KING, appellant, and RUCKMAN, respondent.

1. The general rule is, that in equity time is not of the essence of the contract, unless the parties have expressly so stipulated, or it necessarily follows from the nature and circumstances of the contract.

2. A contract for the sale of land is regarded in equity for most purposes as if it had been specifically executed. The purchaser becomes the equitable owner of the land, and the seller of the purchase money.

3. Not inequitable in this case to decree performance, though payment or offer of payment was not made on the day fixed.

4. Parol evidence of conversations before the execution of a contract, is

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not admissible to alter its terms and thus render it a contract of which time is of the essence. But a defendant to a bill for specific performance may offer such conversation in evidence as independent proof, to rebut an equity set up by complainant.

5. Notice that the defendant would not extend time for payment, cannot aid him. Complainant was ready with the money on the day of payment.

6. The complainant being present with the money at the time and place where he understood payment was to be made, the defendant, after seeking the next day to repudiate the contract, and refusing three days afterwards to receive the money, when complainant expressed willingness to pay it, cannot be relieved from his contract in a court of equity on the ground that the money was not tendered at the proper place.

7. What lands were intended to be embraced in the contract, can be sufficiently gathered from contract, bill, and answer, without resorting to parol evidence to warrant a decree for specific performance.

Two distinct suits were brought in the Court of Chancery, one by King for the specific performance of a contract by Ruckman, for the conveyance of lands; the other by Ruckman to have that contract declared void, and given up to be cancelled. The decrees below dismissed King's bill, and declared the contract void. From both decrees King appealed. The facts of the case sufficiently appear in the opinion of the Chancellor, reported in 5 *C. E. Green* 346.

Mr. W. L. Dayton and *Mr. F. T. Frelinghuysen*, for appellants.

Mr. King complied strictly with all the terms of the contract. The contract indicated Mr. Voorhis' office as the place of payment, and it was so understood by Mr. King. 2 *Parsons on Con.* (2d ed.) 162; *Tabb v. Archer*. 3 *Hen. & Munf.* 399, 435. Agreement and notice that King should meet Ruckman at his, Ruckman's house, are denied by King, both in his answer and in his evidence. 1 *Sug. on Ven. & Pur.* 195, 160.* In fact the evidence and circumstances of the case show that Ruckman told King the payment was to be made at Voorhis' office. The reasonable diligence required of King was exercised by his going to

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Voorhis' office for the purpose of making payment. 2 *Parsons on Con.* 347.

A substantial performance is all that equity requires, and that King did. *Gamet v. Macon*, 2 *Brockenbrough C. C. R.* 185; *Lloyd v. Collett*, 4 *Bro. C. C.* 469; 4 *Ves.* 690.

Time is not of the essence of the contract. It is not made so by direct stipulation. *Parkin v. Thorold*, 16 *Beav.* 65; *Fry on Spec. Perf.*, § 712. It is not so by necessary implication.

When there has been a substantial performance by complainant, time will not be implied to be of the essence of the contract. *Hearne v. Tenant*, 13 *Ves.* 288; *Fry on Spec. Perf.* 312, § 709; *Huffman v. Hummer*, 2 *C. E. Green* 263, 266; *Willston v. Willston*, 41 *Barb.* 635; *Young's Adm'r v. Rathbone*, 1 *C. E. Green* 225; *Toll Bridge v. Vreeland*, 3 *Green's Ch.* 157. Even where expressly stipulated, circumstances may excuse a failure to perform. *Eaton v. Lyon*, 3 *Ves.* 692.

Parol evidence is not admissible to make time of the essence, where there is no fraud, accident, or surprise. 3 *Stark. on Ev.* 997; *Stoutenburgh v. Tompkins*, 1 *Stockt.* 336; *Chetwood v. Brittain*, 1 *Green's Ch.* 439, 449; *King v. Baldwin*, 2 *Johns. Ch.* 557; *Gresley's Eq. Ev.* 173.

A court of equity exercises discretionary power in all cases to administer equity, and looks with indulgence and favor upon a suit for specific performance. *Story's Eq. Jur.*, §§ 776, 777; *Jeremy's Eq. Jur.* 460, 462; *Low v. Treadwell*, 3 *Fairfield* 441; *Radcliff v. Warrington*, 12 *Ves.* 326; 1 *Atk.* 12; 4 *Ves.* 690, and note; *Fry on Spec. Perf.*, § 709; *Runnels v. Jackson*, 1 *How. (Miss.)* 358; *Rogers v. Saunders*, 16 *Maine* 92, 98; *Attorney-General v. Purmont*, 5 *Paige* 620; *Brashier v. Gratz*, 6 *Wheat.* 528; *Story's Eq. Jur.*, §§ 751, 771; *Galway v. Fullerton*, 2 *C. E. Green* 389; *Hopper v. Hopper*, 1 *C. E. Green* 147; *Hall v. Warren*, 9 *Ves.* 608; *Greenaway v. Adams*, 12 *Ves.* 395, 400.

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If Ruckman, the *vendor*, is unable to fulfill all of his part of the contract, equity may yet compel him to perform it *pro tanto*.

The court looks with more favor upon the suit of a vendee to compel specific performance, than upon the suit of a vendor. *Waters v. Travis*, 9 Johns. 450; *Woodcock v. Bennett*, 1 Cowen 711, 754; *Story's Eq. Jur.*, § 779; *Halsey v. Grant*, 13 Ves. 78; *Western v. Russell*, 3 Yes. & B. 192; *Mortlock v. Buller*, 10 Ves. 314; *Graham v. Oliver*, 3 Beav. 123; *Young v. Paul*, 2 Stockt. 401; *Allerton v. Johnson*, 3 Sandf. Ch. 76; *Seton v. Slade*, 7 Ves. 264, 274; *Windman v. Kent*, 1 Bro. C. C. 140; *Alley v. Deschamps*, 13 Ves. 228; *Moore v. Blake*, 1 Ball & B. 68; *King v. Hamilton*, 4 Peters 311; *Fry on Spec. Perf.*, §§ 299, 667; *Mulligan v. Cooke*, 16 Ves. 1; *Hill v. Buckley*, 17 Ves. 394.

King, in his bill, sets out certain deeds of conveyance, and Ruckman, in his answer, admits that he is seized and possessed of the lands described in these deeds, excepting only a small portion sold before the contract. The number of acres contained in these deeds in possession of Ruckman at the time of the contract, can readily be ascertained by reference to a master or otherwise, and can be conveyed to King at \$275 per acre, the price designated in the contract.

It may further be decreed that King have the benefit of any contract which Ruckman may have entered into.

It is within the jurisdiction of this court to decree specific performance as to land lying out of this state. *Story's Eq. Jur.*, § 744; *Massie v. Watts*, 6 Cranch 148; *Sutphen v. Fowler*, 9 Paige 280; 3 Sandf. Ch. 185; 3 Ves. 170; 1 Sim. & Stu. 15; *Hopk.* 213; *Cleveland v. Burrill*, 25 Barb. 532; *Newton v. Bronson*, 3 Kern. 587.

The land to be conveyed is designated with sufficient certainty. "*Certum est quod certum reddi potest*," and for that purpose a reference to a master may be made. *Robeson et al. v. Hornbaker*, 2 Green's Ch. 60; *Ogilvie v. Foljambe*, 3 Mer. 53; *Richardson v. Edick*, 17 Barb. 260. The

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number of acres is fixed definitely. The rest being ascertained, the "two lots in Hackensack township" must necessarily contain the remainder of the two thousand acres.

The "two lots" may be located by parol evidence. *Fish v. Hubbard's Adm'rs*, 21 *Wend.* 652; 2 *Parsons on Con.* 61, 62.

Ruckman, in his answer, admits that he was seized, possessed, and held contracts for about two thousand acres of land in the contract, comprised within the boundaries in the said bill contained.

The certainty of description being admitted in the answer, uncertainty cannot be set up in defence. *Story's Eq. Pl.*, § 606; 1 *Daniell's Ch. Pr.* 726.

Mr. Dixon, for respondent.

The specific performance prayed for by King ought not to be decreed.

Because the court cannot from his bills of complaint ascertain of what lands he seeks conveyance.

Because the contract is so uncertain and indefinite that the court cannot ascertain from it what lands are intended to be contracted for.

Because the evidence does not supply these defects in the contract and bills, and cannot legally be used to supply such defects, since the phrase in the contract, "two lots of land in Hackensack township, &c.," is on its face ambiguous, and therefore cannot be cured by oral evidence; and it appearing that some of the "contracts" mentioned in the principal contract, were but oral, the proof of such contracts must rest on oral evidence, which, under the statute of frauds, is inadmissible.

Because the parties to the contract knew at the time that Ruckman had not title, and so based its specific performance in his getting the title subsequently, and he, not having yet done it, is not able to specifically perform, and the contract being entire, the court will not decree performance of part only.

Because it does not appear that Ruckman can or ought to

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acquire title to the lands which, at the time of the making of the principal contract, he only "held contracts for."

Because King has failed to perform an essential agreement on his part in the contract, the performance of which is a condition precedent to his right to call on Ruckman for performance, in this that he did not on June 1st, 1868, pay or tender the \$19,900 required, and has never since paid or tendered it.

The payment or tender on the day was of the essence of the contract, by the terms of the contract, by the understanding of the parties, by the notice from Ruckman to King, and by the circumstances of the case.

Because King's failure has put it out of the power of Ruckman to perform specifically.

For the foregoing reasons, and because King has made an improper use of the contract by having it recorded, the court will decree its surrender and cancellation of the record.

The opinion of the court was delivered by

DALRIMPLE, J.

This cause was argued at so late a day in the term as to make it impracticable now to enter into any discussion of the questions of law or facts involved.

The court, after careful consideration of the case, has directed me to state the conclusions at which it has arrived, as follows:

First. Time is not of the essence of the contract on which the complainant's bill is founded.

Second. It is a general rule that in equity time is not deemed to be of the essence of the contract, unless the parties have expressly so stipulated, or it necessarily follows from the nature and circumstances of the contract.

Third. A contract for the sale of land is regarded in equity for most purposes, as if it had been specifically executed. The purchaser becomes the equitable owner of the land, and the seller of the purchase money.

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Fourth. In this case there is nothing in the terms of the agreement itself, in the nature of the property, or the attendant circumstances, which would make it inequitable for the court to interfere and decree performance of the contract, though payment, or offer of payment, had not been made on the precise day fixed.

Fifth. Parol evidence of conversations between the parties at and before the execution of the contract, is not admissible to alter, add to, or vary the terms of the written instrument, and thus render it a contract of which time is of the essence. But a defendant to a bill for specific performance may offer such conversations in evidence as independent proof, to rebut an equity set up by the complainant.

Sixth. The defendant's contention that because the second payment of \$19,900 was not made on the first day of June, he lost certain contracts for the sale of land, to fulfill which on his part, it was understood he depended on the receipt of said second payment on the day it fell due, is not well founded, because he says in substance, that these contracts matured during that month of June, and that payment by the 10th would have served his purpose, and further, that on the 2d of June, as early as eight o'clock A. M., he served on complainant a notice that the contract was at an end, and ever afterwards refused to acknowledge its existence.

Seventh. It satisfactorily appears, that while the complainant on and prior to the said 1st day of June, was desirous of fulfilling the contract on his part, the defendant was anxious to rid himself of it.

Eighth. The notice given by defendant to complainant, that the time of payment of the \$19,900 would not be extended, cannot aid the defendant, because the complainant was ready with the money on the day of payment, and the dispute is, whether he produced and offered it at the proper place.

Ninth. By the contract the \$19,900 was payable at the house of the defendant, and not at the office of Mr. Voorhis.

Tenth. Assuming that the defendant's refusal to extend

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the time of payment of the \$19,900, made it necessary for the complainant to make the payment on the precise day stipulated, the weight of the testimony, after giving due and legal consideration to the answer of the defendant, and full credit to the testimony of Mr. Voorhis, is that by an understanding between the parties, the office of Mr. Voorhis was the place at which the payment was to be made. And the complainant having presented himself there with the money on the 1st day of June, and the defendant failing to attend and accept it, and having early the next morning sought to repudiate his contract, and refused three days afterwards to receive the money, when the complainant expressed his willingness to pay it, the defendant's answer to the complainant's case that the money was not tendered to the defendant at his house, on the 1st day of June, cannot prevail in a court of equity.

Eleventh. Though Mr. Voorhis advised the complainant to seek out the defendant at defendant's house, and tender the money to him there, the complainant did not, under the circumstances, lose his rights by not doing so.

Twelfth. Taking the contract, bill, and answer together, it can be made to appear with sufficient certainty, without resorting to parol evidence, what lands were intended to be embraced in the contract.

The result is, that the cross-bill of Ruckman should be dismissed with costs in this court, and the court below, and a decree entered in the original cause, with costs in both courts, directing the defendant, Ruckman, to make conveyance according to his contract, so far as he has the ability to do so. If the defendant should be able to perform his contract in part only, then the value of the lands embraced in the contract, and which he is not able to convey, should be ascertained, and damages awarded to the complainant, or allowance made to the defendant, as the principles of equity may require. In case the lands to be conveyed, or any of them are encumbered, and the defendant cannot remove the encumbrances for want of funds, the complainant must

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assume the encumbrances, or pay the same, and receive an allowance therefor on the purchase money. If the contract cannot now be fully executed, let it be carried into effect on equitable principles, as far as circumstances will admit.

The decree of the Chancellor in the original cause must also be reversed, and a decree entered in this court in accordance with the principles above stated.

For reversal—BEASLEY, C. J., BEDLE, DALRIMPLE, DEPUE, KENNEDY, VAIL, WALES. 7.

For affirmance—OGDEN, OLDEN, SCUDDER, VAN SYCKEL, WOODHULL. 5.

ADDITIONAL RULES
OF THE
COURT OF ERRORS AND APPEALS.

RULE XXXVIII.

Hereafter, the Court of Errors and Appeals, on the first day of the term, will meet at 11 o'clock, A. M.

(March Term, 1869.)

RULE XXXIX.

Appeals from the Prerogative Court shall be governed by the rules of this court relating to appeals from the Court of Chancery.

(March Term, 1870.)

RULE XL.

The printed briefs provided for in the 37th rule, may be furnished by each counsel at the commencement of his argument, without any notice to the opposite party.

(June Term, 1870.)

RULE XLI.

The time allowed by the 12th rule to each counsel, without express permission extending it, shall be limited to two hours and a half.

(Same Term.)

RULE XLII.

The court will hereafter require the points provided for in the 13th rule, to be furnished in all cases previous to the hearing.

(Same Term.)

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ABANDONMENT.

To constitute an abandonment, the facts or circumstances must clearly indicate such an intention. Abandonment is a question of intention. Non user is a fact in determining it, but though continued for twenty years, is not conclusive evidence, in itself, of an abandonment. Its weight must always depend upon the intention to be drawn from its duration, character and accompanying circumstances. *Raritan Water Power Co. v. Veghte*, 463

See MAINTENANCE, 1, 2.

ACCOUNT.

See SALE OF LANDS FOR PAYMENT OF DEBTS, 1, 2.

ACQUIESCENCE.

See INJUNCTION, 3.

ADVERSE USER.

See EASEMENT, 1.

AFFIDAVIT.

See EVIDENCE, 6, 11, 16.

AGENT.

See CONTRACT, 2.
PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMENDMENT.

See LIMITATIONS, STATUTE OF, 2.
PLEADING, 5.

ANSWER.

See EVIDENCE, 4, 5, 6, 10, 11.
PLEADING, 12, 13, 15.
PRACTICE, 9, 10.

APPEAL.

An appeal lies to an order of the Chancellor sustaining exceptions to a bill for impertinence. *C. & A. R. Co. v. Stewart*, 484

See JURISDICTION, 3.
PRACTICE, 12.

APPELLATE JURISDICTION.

1. With respect to appellate jurisdiction, there is a class of cases to which no certain test can be applied, but each case of such class, in this particular, must be adjudged by its peculiar circumstances. *C. A. R. Co. v. Stewart*, 484
2. The case should be especially clear, to warrant the expunging of matter from pleadings as impertinent; but when the Chancellor has struck out statements from a bill which are very prolix, and appear to be of but small importance to the case, this court will not interfere with such order. *Id.*

ASSIGNEE AND ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.
MORTGAGE, 17.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. By a general assignment for the benefit of creditors, the equity of redemption in mortgaged premises vests in the assignee, whether the mortgage deed is absolute or conditional on its face. But property which the debtor has fraudulently conveyed to hinder and delay creditors, which he could not convey to strangers, does not pass by such assignment. *Van Keuren v McLaughlin*, 163
2. Money due at the time of such assignment, to the assignor from purchaser to whom he had assigned his property to defraud creditors, will belong to the assignee. And if the purchaser, after the assignment, pay it to the assignor, it is no bar to the right of the assignee, the payment is in his own wrong, *Ib*.
3. But a court of equity will not, in a decree which declares such sale void as against the complainant as a judgment creditor, direct the purchaser to pay or account for the proceeds to the assignee. *Ib*.
4. When a creditor of the debtor making an assignment for the benefit of creditors, who has not exhibited his claim to the assignee, discovers that lands of the debtor not sold or administered by the assignee, had been conveyed by way of mortgage only, though by deed absolute on its face, such creditor is entitled to his pro rata dividend out of the value of the equity of redemption, as property found by him and not accounted for by the assignee before distribution. *Ib*.
5. The ratable proportion of such creditor is, in the first place, to be paid on his claim the same percentage as the other creditors have received who duly presented their claims, and then to have the residue of such newly found property distributed equally between him and such creditors. *Ib*.

AWARD.

1. The question whether an award is excessive or unjust cannot be considered in a court of equity, nor its merits reviewed. But where the alleged errors are of a sort sufficient to set aside the award, this court will regard them, so that a determination apparently excessive may be reviewed. *W. J. R. Co. v Thomas*, 265
2. This court has jurisdiction over awards, but it will not exercise it in case of awards, which by agreement, are made rules of court. The court in which the rule is entered has that power and must exercise it. *Ib*.
3. No court will review and correct an award: the only power is to set it aside for corruption, or misconduct in the arbitrators, or a plain mistake of law or fact. And if arbitrators decide against law, not by mistake, but of purpose, with the intention of making a just award, when the strict principles of law seem to them to work injustice, their award will not be disturbed. *Ib*.
4. If the arbitrators proceed without the knowledge of either party, and without giving him an opportunity to be heard, or if they decide without any evidence, it is such misconduct as will set aside their award. *Ib*.
5. When a new arbitrator is chosen by the original arbitrators, either party has the right to adduce additional testimony and additional arguments. And when either party has not only not waived such right, but before the award was made, presented his protest to the arbitrators as soon as could reasonably be done, and served an injunction upon them to restrain them from proceeding, and the arbitrators shut him out from this right, and make their award in the face of the protest and injunction, it is such misconduct as will set aside the award. *Ib*.

BOND.

See LIMITATIONS, STATUTE OF, 6.
MORTGAGE, 10, 12, 17.

BURDEN OF PROOF.

See EVIDENCE, 10.
WILL, 17.

CANCELLATION.

See MORTGAGE, 13, 14.

CAVEAT EMPTOR.

1. When \$1000 of the money which a mortgage was given to secure consisted in shares of a mining company, accepted by the mortgagor, on the representation of the mortgagee that he had paid that much for it, but without misrepresentation or fraud by the mortgagee, the \$1000 will not be deducted from the mortgage. *Renton v. Maryott*. 123
2. The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud. *Ib.*

CHARTER.

The J. C. and H. Horse Railroad Company, and the J. C. and B. Railroad Company, were authorized by their charter, to build a railroad through certain streets of Jersey City, to the ferry, subject to first obtaining the consent of the common council. By an ordinance, passed December 13th, 1859, the J. C. and B. Company were authorized to lay a single track in certain streets. The 3d section of that ordinance imposed the following condition: "The consent to the said company to lay said track in Montgomery street to Newark avenue, and in Newark avenue to Grove street, and in Grove, Gregory, and York streets, as stated in the first section, is upon condition

that the J. C. and H. Horse Railroad Company shall have the joint use for their cars, of any track that shall be laid in said streets by virtue of such consent, and that if any disagreement shall arise between said two companies, as to the expense or manner of laying said tracks, or the use thereof, such disagreement shall be finally adjudicated and settled by the common council." The 9th section provided that the ordinance should go into effect as soon as the J. C. and B. Company should, under their signature and seal, agree that they would apply, at the next session of the legislature, and obtain if possible an amendment to their charter, so that in obtaining the consent of the common council to lay their rails, they should be subject to such conditions as said council by ordinance may have imposed. Such agreement was executed by the Bergen Company, December 14th. They accordingly obtained a supplement to their charter, which was approved March 17th, 1860. The 2d section of that supplement provides: "That the said J. C. and B. Railroad Company, in laying, repairing, and maintaining their rails, and constructing their roads in the streets of Jersey City, shall be subject to such conditions as the common council of said city in the ordinance granting consent to lay such rails and construct said road, shall have imposed, or shall impose upon said company." The common council passed an ordinance January 10th, 1860, authorizing the J. C. and H. Company to lay a single track through certain streets. The 3d section of this ordinance provides, that the Hoboken Company shall have the joint use of the tracks of the Bergen Company, so far as may be necessary to run the cars of the Hoboken Company to and from their tracks in certain streets to Hudson street, upon their agreement with the Bergen Company, in accordance with section three of the ordinance passed December 13th, 1859. *Held—*

1. That the condition of the 3d section of the Bergen Company's ordinance is, by virtue of their agreement

with the Hoboken Company, and of the 2d section of said supplement of 1860, as effectually a part of that supplement as if embodied in terms therein, and binding upon the Bergen Company, and the Hoboken Company is entitled to the joint use of the Bergen Company's track through the streets specified.

2. The right, though vested, cannot be exercised entirely at the expense of the Bergen Company.
3. The provision that, in case of disagreement between the companies as to the expense or manner of laying the tracks, or their use, such disagreement should be finally adjudicated and settled by the common council, was proper and lawful. It became embodied in the act of incorporation, and is a condition on which the franchise is to be enjoyed, and does not depend merely upon the force of an agreement to arbitrate.
4. The termination of the agreement as to the terms of use of tracks through certain streets (pursuant to notice, in accordance with the terms of the agreement) did not affect the *right* of joint use of the Bergen Company's tracks, or entitle the Bergen Company to enjoin the use by the other until a new agreement could be made, or the common council should adjudicate the matter.
5. The common council had no power to declare a forfeiture by the Hoboken Company of their right to use the Bergen Company's tracks, for non-payment of the amount adjudicated. That right is vested, and no authority was given to the council to forfeit for non-payment.
6. The words "upon their agreement," &c., in the 3d section of the ordinance of January 10th, 1860, do not qualify the right of the Hoboken Company; that right became fixed by the ordinance of December 13th, 1859.
7. The true intention of the said ordinance of January 10th, 1860, was only to subject the joint use to just such condition as was contained in the 3d section of the Bergen Company's ordinance.
8. The tracks of the Bergen Company subject to the joint use by the Ho-

boken Company are those only, named in the 3d section of the Bergen Company's ordinance of December 13th, 1859. *J. C. & H. Horse R. Co. v. J. C. & B. R. Co.* 550

See LICENSE, 1.
RAILROAD COMPANY.

CHATTEL MORTGAGE.

See MORTGAGE, 15, 16, 18, 19.

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See JUDGMENT CREDITOR, 1.

CONSENT.

See LICENSE, 1-3.

CONSIDERATION.

See MORTGAGE, 1, 2.
PLEADING, 1-3.

CONSTITUTIONAL COURT.

See JURISDICTION, 5, 6.

CONSTITUTIONALITY OF LAWS.

See JURISDICTION, 4.

CONTRACT.

1. A mistake as to facts or the contents of a contract for the sale of land, might, in some cases, excuse or modify the performance, but the vendor must perform it according to its legal effect, unless he is misled by the fault of the other party. *Zane v. Cawley*, 130
2. If a plaintiff in execution, make an agreement with the defendant that he will buy the property at sheriff's sale and hold it for his benefit, and takes advantage of such agreement to buy in the property at prices lower than he other-

wise could have done, he will be taken to hold in trust for the defendant, who will be allowed to redeem. But a court of equity will not enforce such an agreement, being merely in parol, unless the fraud or *mala fides* be clearly and fully shown. *Walker v. Hill's Executors*, 191

3. The mere non-performance of a beneficial parol agreement, is not a fraud which will induce a court of equity to compel performance. *Ib.*

4. A notice given under a contract must be construed according to the intention of the contract. Though the notice is in terms to revoke a contract, but the evident object of it is to revoke only an authority or license under the contract, the authority or license only will be thereby revoked. *Green v. Wilson*, 211

5. An agreement endorsed on a mining lease, and stipulating "that the parties of the second part shall, at the expiration of two years from the date hereof, pay unto the said W. and D. the sum of \$10,000 in lieu of the ten per cent. agreed upon in said lease, then the said W. and D. shall make a good and lawful deed of conveyance for the above described premises in the within lease, &c.," held to be an absolute agreement by the lessees to purchase the leased premises at the end of two years. *Suffern v. Butler*, 410

6. This being the plain import of the words of the contract taken in their ordinary sense, the court is bound to presume, in the absence of any allegation of fraud or mistake, that such was the real meaning of the parties. *Ib.*

See EVIDENCE, 13, 14.

SPECIFIC PERFORMANCE, *passim*.

CONTRIBUTION.

See SALE OF LANDS FOR PAYMENT OF DEBTS, 5, 6.

COSTS.

The cost of printing the case in the Court of Appeals cannot be included by the successful party in his taxed bill of costs. *Decamp v. Crane*, 544

See MORTGAGE, 13.

PARTITION, 5.

COVENANT.

1. A covenant in a deed, "it being expressly understood and agreed, that the houses which may be erected on Gilbert street, shall be set back ten feet from the southerly line of said street," is a covenant running with the land, and binds not only those who derive title from the covenantors, but also their grantees. *Winfield v. Henning*, 188

2. At law, the purchaser of one of these lots from the grantee could not enforce this covenant against the purchaser of another of them. But, in equity, its observance will be enforced in his favor. *Ib.*

See MORTGAGE, 4, 5, 6.

SPECIFIC PERFORMANCE, 22, 27.

CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

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MORTGAGE, 7, 8.

CROSS-BILL.

A defendant, ignorant of facts which entitle him to file a cross-bill, until the depositions of complainant's witnesses reveal such facts, if he files his cross-bill without unnecessary delay, cannot be deprived of the benefit of such facts at the complainant's instance, where he was willfully kept in ignorance of them by a person acting in concert with the complainant, and who had been recommended by complainant to the defendant as a trustworthy person in the transaction, but whose fraudulent conduct was the ground

of the cross-bill. *Berryman v. Graham*, 370.

See PRACTICE, 1, 2, 10, 15.

DAM.

See EASEMENT, 1-3.
JURISDICTION, 11.
NUISANCE, 1.
PRESCRIPTION, 3.

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.
FRAUDS, STATUTE OF.
JUDGMENT CREDITOR.

DECLARATION OF TRUST.

See EVIDENCE, 17.
FRAUD, 3.

DECREE.

A decree which refers to the cap piece of the dam, as fixing the extreme height to which the water may be raised by the use of the gates when shut, though more specific in its direction than is usual, is not objectionable for that reason. *Carlisle v. Cooper*, 576.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3.
MORTGAGE, 13, 17.
NUISANCE, 1.
PLEADING, 9.
PRACTICE, 1, 7, 8, 16.
PRESCRIPTION, 3.

DEED.

See EQUITY OF REDEMPTION.
SHERIFF'S SALE.

DEFENSE.

See MORTGAGE, 4, 5, 6.
NUISANCE, 1.
PRACTICE, 15.

DELAY.

See INJUNCTION, 3.
SPECIFIC PERFORMANCE, 4, 11, 12, 15.

DEMURRER.

See JURISDICTION, 2.
PLEADING, 10.

DEPOSITION.

See EVIDENCE, 15.

DESCENT.

1. The surplus of the proceeds of lands of an infant sold by order of the Orphans Court to pay debts of her father, from whom she inherited them, remains real estate, and at her death must descend as such, *Fidler v. Higgins*, 138.
2. The descent of real estate in New Jersey is governed by the rules of the common law, so far as these rules have not been changed by statute. *Ib.*
3. The common law rule, that among collateral relatives, lineal descendants shall represent their ancestor *ad infinitum*, has not been altered, either expressly or by implication, by the statutes of New Jersey regulating descents. *Ib.*
4. The degrees of consanguinity mentioned in the sixth section of the statute of descents, must be ascertained by the common law rule as to descent of real estate, allowing representation among collaterals, which, like the rule prohibiting ascents, has never been changed. The rule of the Civil law for computing next of kin, has never been adopted in this state, and it is not required by any implication from the provision of this section. And the "equal parts" in this section must be held to mean equal *per stirpes*, as the like words, "equal portions," in the statute of distributions are settled to mean. *Ib.*

5. By such representation, cousins and more remote descendants of deceased uncles of an intestate are the same degree as living uncles, and inherit, by representation, the share of such deceased uncle. *Ib.*

DESERTION.

See DIVORCE, 6, 9, 10, 12.

DEVISE.

See EXECUTION.
WILL, 3.

DISCOVERY.

See PLEADING, 1, 2.

DISMISSAL.

See PRACTICE, 11.

DIVIDEND.

See ASSIGNMENT FOR BENEFIT OF
CREDITORS, 4.

DIVORCE.

1. A party who has negatively violated the marriage contract in its two most vital points, to love and to cherish, and has only performed it in the last and least, to support, comes into a court of equity with an ill grace to complain of a positive breach by the party whom he first injured. *Derby v. Derby*, 36.
2. Unsupported evidence by an alleged paramour as to a wife's ante-nuptial incontinence, is insufficient to overcome her positive denial. Even if fully proved, such incontinence would be no foundation for a divorce, nor admissible to support proof of her subsequent adultery. *Hedden v. Hedden*, 61.
3. A husband who connives at or assents to adultery by his wife with one person, will be deemed as as-

sending to it with others, and will not be entitled to a divorce for a subsequent act of adultery with a different person. It will not affect the case, that the act of adultery at which the husband connived was not committed. *Ib.*

4. If a husband sees what a reasonable man could not see without alarm, or if he knows that his wife has been guilty of ante-nuptial incontinence, or if he has himself seduced her before marriage, he is called upon to exercise peculiar vigilance and care over her, and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the result. *Ib.*

5. He is not discharged from the exercise of such vigilance by the fact of his having deserted his wife and all his marital obligations for three years, or his having obtained a divorce in another state. If the marriage relation exists in this state, so that he can complain of a violation of its obligations, he cannot claim advantage of his wife's incontinence, when caution on his part would have prevented it. *Ib.*

6. *Quære.* Whether desertion for three years, under circumstances which entitled the defendant to a divorce before the commencement of complainant's suit, and before any adultery proved against defendant, would bar the complainant. *Ib.*

7. It is not sufficient to entitle a party to a divorce on the ground of adultery, to prove that the defendant who might be supposed willing to commit the adultery, was in a position in which it was possible to commit it. It must be shown that the defendant and the party with whom the crime is charged to have been committed, were together under suspicious circumstances, which cannot be easily accounted for, unless they had that design, or which could not well be explained without it. *Mayer v. Mayer*, 246.

8. The testimony of a defendant

charged with adultery, and of the supposed adulterer, is competent, and in a doubtful case, must control the question. *Ib.*

9. Improvidence and gross intemperance on the part of the husband and a failure to support his wife, may justify her in leaving him, but do not amount to the extreme cruelty that would justify a divorce *a mensa et thoro*, much less will they convert her leaving into a desertion by him, so as to entitle her to a divorce for it. *Laing v. Laing*, 248

10. When husband and wife are living separately, and one seeks a divorce from the other on the ground of desertion, the facts relied upon to convert the living separately into a desertion, must be proved by other testimony than the oath of the complainant alone. *Woodworth v. Woodworth*, 251

11. Although the testimony of a party is competent in divorce cases, a divorce will never be granted upon such testimony alone as to the cause of such divorce. *Ib.*

12. Refusal by a wife of marital intercourse with her husband does not justify him in deserting her. *Reid v. Reid*, 331

13. When in a suit for divorce adultery is pleaded in recrimination, the acts of adultery must be designated and specified in the same manner required in a bill or petition for divorce for adultery. *Ib.*

14. A charge of adultery pleaded in recrimination as a bar to divorce, must be sustained by other proof than the unsupported evidence of the defendant pleading it. *Ib.*

See EVIDENCE, 2, 3.

EASEMENT.

1. The extent of the right to flow the lands of another acquired by adverse user, is not determined by the

height of the structure of the dam, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription. *Carlisle v. Cooper*, 576

2. As a general rule, the height of the dam when in good repair and condition, including such parts and appendages as make its efficient height in its ordinary action and operation, fixes the extent of the right to flow, without regard to fluctuations in the flowage which are due to accidental causes, such as a want of the usual repairs, or the variation in the quantity of water in the stream in times of low water or drought, or in the pondage of the dam by its being drawn down by use. *Ib.*

3. There may be such continuity of use of flash boards as that they, in effect, are parts of the permanent structure, and by such user a right to flow by means of a permanent dam to the height of such boards may be acquired, but the occasional use of flash boards for short periods, when little or no injury may be done, as an exception to the general rule not to keep them on, does not amount to the open, uninterrupted, and notorious adverse use necessary to establish a prescriptive right. *Ib.*

ENROLLMENT.

See PRACTICE, 8.

EQUITY OF REDEMPTION.

Where a deed, absolute on its face, is given as a security for the payment of money, by or for the grantor to the grantee, it will be held in equity that the grantee took the premises subject to redemption. *Crane v. Decamp*, 411

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 4.

ESTOPPEL.

An equitable estoppel will affect a subsequent purchaser to the same extent as his grantor, when he has had actual notice of the condition of things upon which it is based, or when the circumstances are such as to put him upon inquiry to ascertain the facts. *Raritan Water Power Co. v. Veghte*, 463

See RAILROAD COMPANY, 6.

EVIDENCE.

1. A witness should not be allowed to have his direct testimony read to him before cross-examination. Such irregularity is not sufficient to suppress the testimony, but must almost destroy the credibility of the witness. *Derby v. Derby*, 36
2. A written confession of adultery, formally sworn to before an authorized officer, will have no weight as evidence when made under circumstances which compel the belief that it was not fairly obtained or understandingly made. *Ib.*
3. The testimony of a single witness may be sufficient proof of adultery to sustain a decree of divorce, though denied by the defendant upon oath. But such effect must depend upon the probability of the story, the character of the witness, and consistency of his evidence, and perhaps somewhat on the character of the defendant. *Ib.*
4. When the matters constituting the complainant's equity are clearly and definitely denied in a responsive answer, they must be proved by the oath of more than one witness. *Zane v. Cawley*, 130
5. The unsupported testimony of the complainant is not sufficient to overcome the responsive denial of the answer. *Calkins v. Landis*, 133
6. The oath annexed to an answer to a bill which prays for answer without oath, though evidence against the complainant on a motion to

dissolve the injunction, is not evidence on the hearing of the cause. *Walker v. Hill's Ex'rs*, 191

7. The testimony of a complainant, taken after the defendant's executors were made parties, but before either of them had been sworn as witnesses, is incompetent; and if such party is objected to as incompetent when offered, his testimony is inadmissible. *Ib.*
8. Upon a reference to examine and report whether the interest of infants requires and will be promoted by a sale of their lands, the master must report his own opinion, formed from facts, not that of others, nor an opinion founded upon that of others without facts. Mere opinion of witnesses is no evidence. *In Matter of Heaton*, 221
9. The testimony of the father and mother, owning a life estate in the premises, that the interest of the infants would be promoted by a sale, when they would be clearly benefited by the sale at the expense of the infants, should not be acted on and hardly received. *Ib.*
10. An answer, though responsive, has not the effect of evidence, where the facts are not within the personal knowledge of the defendant. It throws the burden of proof on the complainant, but has no further weight. *Lawrence v. Lawrence*, 317
11. The affidavits to the bill and answer are not evidence at the final hearing. *Attorney-General v. Steward*, 340
12. An objection to an instrument as evidence, on the ground of a want of a sufficient United States revenue stamp, comes too late after such instrument has been offered and received in the cause without opposition. *DeCoursey v. Collins*, 357
13. When the language of a written contract is ambiguous, or otherwise doubtful, evidence from without is admissible to show the real intent of the parties. *Suffern v. Butler*, 410

14. But such evidence can not be admitted when the language is so clear and explicit as to leave no room for doubt as to its meaning.

Ib.

15. A deposition of a deceased or foreign witness, appended to an injunction bill, is not competent in the absence of proof that the suit in which it was taken was between the same parties and related to the same subject matter, and the only legitimate proof of such deposition is by a compared or duly certified copy. *C. & A. R. Co. v. Stewart*, 484

16. There is no relaxation of the rules of evidence with respect to affidavits annexed to injunction bills.

Ib.

17. A promise to execute a deed or writing in the nature of a declaration of trust of lands, cannot be proved by parol. *Marshman v. Conklin*, 546

See DIVORCE, 2, 7, 8, 10, 11, 14.
LIMITATIONS, STATUTE OF, 1.
MASTER'S REPORT.
PLEADING, 13, 16.
SALE OF LAND FOR PAYMENT OF DEBTS, 2.
SPECIFIC PERFORMANCE, 31.
WITNESS.

EXECUTION.

Where a testator made his executors trustees of all property, estate or interests, given or devised by his will (excepting a life estate in the mansion-house devised to his son), with authority to sell and convey all or any part of his real estate, the power to sell prevails over the prior devises; and an execution levying on such estate and interests, issued after the same were sold and conveyed by the executors, upon a judgment recovered before such sale and conveyance, is subordinate to the power of sale and can have no effect on the property. *Wetmore v. Midmer*, 242

EXECUTOR.

See POWER OF SALE.

FINAL HEARING.

See EVIDENCE, 6, 11.

FOREIGN JUDGMENT.

A judgment recovered in the state of New York must receive here the same effect to which it is entitled there. *Chew v. Brumagim*, 520

FORFEITURE.

See CHARTER, 5.

SPECIFIC PERFORMANCE, 21.

FRAUD.

1. Courts of equity have, peculiarly, cognizance of matters of fraud, and have jurisdiction over instruments affected by fraud, and will declare them void on that account, even though the fraud is such as might be proved at law so as to avoid the effect of the instrument. *Monmouth County Mutual Fire Ins. Co. v. Hutchinson*, 107

2. Fraud in this case held to be established, but even if it was perpetrated without the complainant's knowledge, yet there was clearly such mistake as to entitle the defendant to relief in this court. *Berryman v. Graham*, 370

3. A failure or refusal by a grantee of lands to execute a declaration of trust therefor in accordance with an alleged promise so to do, does not, of itself, amount to what is meant in law by fraud, imposition, unconscionable advantage, or undue influence. *Marshman v. Conklin*, 546

See CONTRACT, 2, 3.
MORTGAGE, 7, 8.
PLEADING, 11.
PURCHASER.

FRAUDS, STATUTE OF.

1. A mortgage given by an insolvent firm to trustees to secure bonds, which the debtors subsequently passed to their creditors, declared to be void under the second section of the statute of frauds, and within the rule in *Owen v. Arvis*, 2 *Dutcher* 23. *Bank of the Metropolis v. Sprague*, 530
2. But it is void only as to those creditors who have raised the issue by their pleadings. *Ib.*
3. The right of the insolvents to pass the bonds to their individual creditors not assented to. *Ib.*

See PLEADING, 13.

FRAUDULENT ASSIGNMENT.

See JUDGMENT CREDITOR, 1, 3.

FUTURE ADVANCES.

See MORTGAGE, 3.

GRANT.

See RAILROAD COMPANY, 4.

HOTCH POT.

See PLEADING, 3.

HUSBAND AND WIFE.

See SPECIFIC PERFORMANCE, 6, 7.
WITNESS, 1.

INADEQUACY OF CONSIDERATION.

See SHERIFF'S SALE.

IMPERTINENCE.

See APPELLATE JURISDICTION, 2.
PLEADING, 16.

INFANTS.

1. When an issue is made by the pleadings and proofs on the question of the right to the permanent custody of infants, the case addresses itself to the general authority of equity as the public guardian of infants. *Baird v. Baird*, 384
2. In such a proceeding it is not the technical right of either parent which will control the decision, but the primary motive of judicial action will be the well-being of the infants. *Ib.*
3. In the exercise of its legal discretion, the court in this case gave some of the children into the custody of each parent. *Ib.*

See WILL, 9.

INFANTS' LANDS.

1. It is not a sufficient reason for the sale of infants' reversionary estate in lands, that the property is so much out of repair that it would now cost more to put it in tenantable repair than the income would justify, when the property has been in the actual possession of the life tenants. If they have suffered it to get out of repair, they are bound to put it in as good repair as it was when they entered upon it. *In matter of Heaton*, 221
2. Upon an application for the sale of infants' reversion in land, the only question is, will the property bring as much now as it will at the death of the life tenant? If it will not, it is not for the interest of the infants to sell, if the life tenant is to receive a share of the proceeds, or of the income from them, according to the rules of this court. *Ib.*

INJUNCTION.

1. A stipulation in a lease of a quarry of a horse shoe shape, and having faces on the northwest, north, east, and southeast sides, "that said quarry shall be worked as the face

is now opened," is not violated by quarrying one of the faces to a greater extent than another, and such quarrying will not be enjoined if the same general shape is preserved. *Keeler v. Green*, 27

2. On final hearing upon bill and answer, a preliminary injunction will be made perpetual where it appears from the pleadings that the defendants intend to do some act charged in the bill, which would be a nuisance to the public, or an injury to the complainants. *Attorney General v. Steward*, 340

3. Mere delay in applying to the court is frequently a ground for denying a preliminary injunction, and is also a reason for courts of equity refusing to take cognizance of a case where there is a remedy at law. But where the legal right is settled, and the more efficacious remedy of a court of equity is necessary to complete relief, delay is no ground for a denial of its aid, unless it is coupled with such acquiescence as deprives the party of all right to equitable relief. *Chute v. Cooper*, 376

See EVIDENCE, 6, 15, 16.

JURISDICTION, 1, 8-11

NUISANCE, 1.

PARTIES, 4

PLEADING, 1, 12, 15

RAILROAD COMPANY, 6, 10.

See *Weissenborn v. Sieghartner*, 183

INSOLVENCY.

Insolvency defined. *Bank of the Metropolis v. Sprague*, 530.

See FRAUDS, STATUTE OF.

INSURANCE

See PLEADING, 7, 8.

ISSUE.

See JURISDICTION, 10, 12, 13.

JUDGMENT.

See FOREIGN JUDGMENT.

JUDGMENT CREDITOR.

1. A judgment creditor who has exhausted his remedy by execution, may proceed against the choses in action of his debtor and a court of equity will set aside a fraudulent assignment by the debtor of such choses in action, to enable the creditor to proceed against them. *Tantum v. Green*, 364

2. Such creditor is entitled to have the mortgage debts due the judgment debtor collected by a receiver and applied to the payment of the judgment. *Id.*

3. But it is not sufficient for the creditor simply to prove that the debtor made the assignment for the purpose of hindering, delaying, and defeating the collection of the judgment. He must show that the assignee participated in such fraudulent intent, or at the time he took the assignment had notice of facts and circumstances, from which the fraudulent intent of the assignor was a natural and legal inference. *Id.*

JURISDICTION

1. The questions, whether, under an act to authorize a township to issue bonds to raise money to pay to such persons, who had or might volunteer in the army of the United States, bonds could be issued, or money raised for drafted men, or for any one but volunteers whether a majority of the town committee, without a regular call for a meeting, could lawfully fill up, or seal, or deliver a bond; and whether they could do this in a place out of their own township; are proper to be determined by the courts of law, and by them only, and this court will not restrain a suit at law, in which these questions fairly arise, that they may be determined here. *Inhabitants of Winslow v. Hudson*, 172

2. The fact that the validity of a patent is, or may be involved in a suit for the violation of a covenant under seal, is not a ground for demurrer; the state courts have jurisdiction. When such suit is between citizens of the same state, the Federal courts have no jurisdiction. *Green v. Wilson*, 211
3. An appeal will lie by force of the act of 1869, from a decree of the Prerogative Court in a matter of probate to the Court of Errors and Appeals. *Harris v. Vanderwever's Executor*, 424
4. Such act is not unconstitutional. *Ib.*
5. The peculiar quality of a constitutional court is, that it cannot, in its fundamental constitution, be altered by the legislature, nor in any other manner than in the mode prescribed in the Constitution; but an enlargement of jurisdiction is not such an alteration. *Ib.*
6. The phrase "as heretofore," in Article VI, section 1, of the Constitution, if descriptive of the jurisdiction of this court, has no important significance, as the jurisdictions of all the constitutional courts, by necessary intendment, are established as they existed antecedently to the date of the Constitution. *Ib.*
7. The Prerogative Court is not, by its nature, a court of the last resort, and there is nothing in the present Constitution making it such. *Ib.*
8. The jurisdiction of courts of equity over the subject matter of nuisances, is not an original jurisdiction. It does not arise from the fact that a nuisance exists, but results from the circumstance that the equitable power of the court is necessary to protect the party from an injury for which no adequate redress can be obtained by an action at law, or its interference is necessary to suppress interminable litigation for the recovery of damages for an actionable wrong. As a condition to the exercise of that power it is essential that the right shall be clearly established, or that it should previously have been determined by the action of the ordinary tribunals for the adjudication of the rights of the parties, and the injury must be such in its nature or extent, as to call for the interposition of a court of equity. *Carlisle v. Cooper*, 576
9. The rule of the English law requiring the complainant's legal rights to be first established in a court of law, before a court of equity will give relief in cases of nuisance, has been somewhat relaxed. The mere denial of the complainant's right by the defendant in his answer, will not oust the court of its jurisdiction by injunction. So also when the complainant has for a long time been in the undisputed possession of the property or enjoyment of the right with respect to which he complains, and the acts of the defendant which constitute the injury to such property, or the invasion of such right, have been done recently before the filing of the bill, the Court of Chancery will entertain jurisdiction to decide and dispose of the entire litigation, if the evidence does not raise any serious question as to the fact of the existence of the complainant's rights when the bill is filed. *Ib.*
10. Where a complainant seeks protection in the enjoyment of a natural watercourse upon his land, the right will ordinarily be regarded as clear. The mere fact that the defendant denies the right by his answer, or sets up title in himself by adverse user, will not entitle him to an issue before the allowance of an injunction. *Ib.*
11. Where complainant's lands are rendered comparatively worthless by backwater from a dam, and a nuisance is thereby created deleterious to health, and the enjoyment of the premises is thereby impaired, an action at law furnishes no adequate remedy, and the complainant is entitled to the protection of a court of equity by the abatement of the nuisance. *Ib.*

12. Where the complainant's right to the relief sought by the bill is admitted by the answer, and also established in a suit at law, and the sole question of fact in controversy is, whether the defendant has effected an abatement of the admitted nuisance by lowering his dam to the required level, a court of equity is an appropriate tribunal to decide that question. There is nothing in the subject matter of such investigation that would entitle the defendant to an issue as of course. *Ib.*
13. The granting or refusing of an issue is a matter of discretion. *Ib.*
14. The power of courts of equity to order the trial of an issue of fact which the court is itself competent to try, ought to be sparingly exercised, and a practice of sending ordinary matters to the decision of a jury ought not to be established. Where the truth of facts can be satisfactorily ascertained by the court, without the aid of a jury, it is its duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law. *Ib.*
2. Whether a legacy is vested or contingent, depends upon the event, and not upon the time. If the event is uncertain, the legacy is contingent though the time is fixed; if certain, the legacy is vested though the time is uncertain. *Beatty's Adm'r v. Montgomery's Executrix.* 324
3. A legacy to A for life, and upon A's death to B, C, and D, is a vested legacy; and if B, C, and D die in the lifetime of A, their legal representatives are entitled, upon A's death, to their respective portions. A provision in the will that in case of the death of either of the legatees in the lifetime of A his share should go to the survivors or survivor, does not prevent the vesting. *Ib.*

4. If a legacy is given simply to A without fixing any time for payment, with provision that if A shall die it shall go to B, this gives a vested legacy to A if he survives the testator; the death is held to be death in the life of the testator. *Ib.*
5. But if a legacy given to one at the death of a person named is given to another in case such legatee should die, this is held to refer to death in the life of the person at whose death it is given. Such legacy vests at the death of the testator. *Ib.*

See FRAUD. 1.
MARRIAGE. 2.

LACHES.

See INJUNCTION, 3.
SPECIFIC PERFORMANCE. 4. 11. 12
15

LEASE.

See INJUNCTION. 1.

LEGACY.

1. A gift of the interest of \$12,000 to A during life, and, at her death, of the principal to B, is a vested legacy, and if A survives B, goes, upon her death, to B's representatives. *Thomas' Ex'r v. Anderson's Adm'r.* 22

LICENSE.

1. The right to divert water is an incorporeal hereditament, and at the common law, could only be created by deed. But when a charter of a water power company gives a right to divert the water of a river, upon the written consent or permission of those owning lands and water privileges, such written consent obtained after the act, with the assistance of the act, operates as a substitute for the common law method, and has the effect of granting to the company a legal right to divert. *Raritan Water Power Co. v. Veghte.* 463

2. If such consent was in fact, however, obtained previous to the grant of the charter, it was a license merely. But when such license has been executed upon the lands of the licensor, and permanent works and improvements erected in pursuance thereof, at great expense, equity will not, to the extent that the license is executed, disturb it, or permit its revocation. *Ib.*
3. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent, although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee. *Ib.*
1. The measure of the execution of the license, in this case, is the capacity of the dam and canal as originally constructed, regarding the culverts only as a means of supply, according to the necessity of business, and liable to any change in their location or construction, the better to enjoy the benefit of the dam and canal as originally built and completed, the equity being that the defendants shall, if necessary, have the full use of the expenditure made on the faith of the consent within its terms, and depending upon it. *Ib.*
- six years, an agreement not to take advantage of the statute of limitations, cannot be given in evidence, it is not within the issue. The only question is whether there was any promise within six years. *Cocart v. Perrine*, 101
2. The old practice would have allowed a rejoinder, that the defendants had agreed not to plead the statute. Now, a rejoinder is not allowed, but the promise should be alleged in the bill, and if omitted by inadvertence, the complainant would be allowed to amend. *Ib.*
3. A promise not to take advantage of the statute, made pending a negotiation for allowing further time to arbitrators to report, will not be construed to be an agreement never to take advantage of the statute, but to be an agreement that the statute should not run while the arbitration was pending. After that was revoked and at an end, the statute would begin to run. *Ib.*
4. The ruling in this case in 3 C. E. Green 454, that a submission to arbitration does not prevent the running of the statute of limitations, is not affected by the fact, that pending the submission, the right to sue was suspended. *Ib.*
5. A mortgage is presumed to be satisfied, if no claim has been made and no interest paid upon it within twenty years after it becomes due, and no circumstances are shown to explain the delay and rebut the presumption. *Barned v. Barned*, 215
6. Payment will not be presumed, because the statute of limitations has, at law barred a suit on the bond. *Ib.*

See PLEADING, 6

LIS PENDENS.

See PRACTICE, 3

LIMITATIONS, STATUTE OF.

1. Upon replication filed to a plea that there was no promise within

MAINTENANCE.

1. Where a husband actually drives his wife from himself and his house, or, by his cruel and abusive treatment, compels her to leave it for her safety or comfort, it is an abandonment and separation by him, and would entitle her to support and maintenance, under the tenth section of the divorce act. *Starkey v. Starkey*, 135.
2. But where the wife leaves her husband and his home, and goes and continues to reside elsewhere, this is *prima facie* abandonment by her, and she must show clearly that her going away was compulsory. *Ib.*

MARRIAGE.

1. A marriage ceremony, though actually and legally performed, when it was in jest, and not intended to be a contract of marriage, and it was so understood at the time by both parties, and is so considered and treated by them, is not a contract of marriage. Intention is necessary, as in every other contract. *McClurg v. Terry*, 225.
2. The Court of Chancery has the power to declare a marriage void, when performed in jest, and where it was not intended to be a contract of marriage. *Ib.*

MARRIED WOMEN.

A mere accommodation note or accommodation endorsement by a married woman, is not sufficient to create a charge upon her separate estate. *Peake v. LaBar*, 269.

MASTER'S REPORT.

When the evidence taken before a master is evenly balanced, his conclusions thereon will not be set aside unless clearly wrong. *Clark v. Condit*, 322.

See EVIDENCE, 8.

MERGER.

See MORTGAGE, 9, 13.

MISJOINDER.

See PLEADING, 10.

MISTAKE.

See CONTRACT, 1.
FRAUD, 2.
SHERIFF'S SALE.

MORTGAGE.

1. An instrument under seal is good, though no consideration was given for it. Courts will not allow the consideration to be inquired into for the sake of declaring the instrument void for want of consideration, but they will, for the purpose of ascertaining what is due upon it. *Farnum v. Burnett*, 87.
2. A mortgage given by the legal owner of the fee of mortgaged premises to one of several persons having a beneficial interest therein, with the consent of all the others, for the avowed purpose of enabling him to raise money on it, is a perfectly valid security, and in the hands of any one who has advanced money or become security for money raised, is upon a sufficient consideration to sustain it, as against all subsequent encumbrancers or purchasers. *Ib.*
3. A mortgage made for future advances is good as against a subsequent purchaser or mortgagee. *Ib.*
4. The failure of a mortgagee to keep his covenant to procure certain releases, is no defence to a suit for a foreclosure of the mortgage, where the mortgagor agreed to pay the money at a certain time absolutely, and not on condition that the releases had been procured. *Coursen v. Canfield*, 92.
5. It does not affect the question, that the suit is brought by a *bona fide* purchaser of the mortgage for a

- valuable and full consideration, without notice of this covenant. He holds it subject to every equity and defence to which it was subject in the hands of the mortgagee. *Ib.*
6. Courts of equity will not give to such independent covenants an effect different from their legal effect, or turn independent covenants into conditional, because it will give better protection to a party, or diminish litigation. *Ib.*
7. A mortgage given by a partner, after the failure of the firm, to secure a debt justly due to an individual creditor, is not necessarily tainted with fraud by the fact that no charge was ever made or bill presented until the mortgagor was alarmed by prospective embarrassments, and that the account was made out, and charges agreed upon for this very mortgage. *Stillman's Ex'rs v. Stillman*, 126
8. A subsequent or even cotemporaneous attempt to convey or encumber property so as to delay creditors, cannot affect a mortgage fairly given to secure a *bona fide* creditor. *Ib.*
9. The purchase of a mortgage by the executors of the mortgagor, where the mortgaged premises are owned by a third party, does not satisfy it. *Ib.*
10. One may purchase his own mortgage on land that he has sold, and although such purchase may render the bond unavailing, yet where lands are conveyed subject to the mortgage as part of the consideration, the mortgage is the principal security, and even if the obligor pay the bond, he is entitled to be subrogated as to the mortgage, and to be repaid out of the land what he has paid on his own bond. *Ib.*
11. Where mortgaged premises are conveyed subject to a mortgage, and the grantee conveys the premises in two parcels, and the parcel last conveyed is released from the mortgage, the other parcel must pay such proportion of the amount due on the mortgage, as its value bore to the value of the whole tract at the time of the conveyance of such parcel. *Ib.*
12. When the condition of the bond provides that upon failure to pay the interest within a definite time after it becomes due, the principal shall become due, mere negligence or forgetfulness as to the place where or person to whom it is to be paid, will not excuse the non-payment, and the contract will be enforced. *Spring v. Fisk*, 175
13. When a mortgagee is made defendant to a suit for foreclosure, and the final decree in that suit gives such mortgagee his costs, he will not be required to cancel or release his mortgage before the costs are paid. The mortgage is merged in the decree, and such relief will not be granted until the decree is fully satisfied. *Lewis v. Conover*, 230
14. *Quære*. Whether, after such decree, a suit can be maintained in equity to compel the release or canceling of the mortgage. *Ib.*
15. The statute relating to chattel mortgages requires, when some of the mortgagors live in and others of them live out of this state, that the mortgage shall be recorded in the counties in which such residents live, and also in the county where the chattels are situate. *DeCoursey v. Collins*, 357
16. A first chattel mortgage unregistered, is absolutely void against a second mortgage taken in good faith; and such second mortgage need not be recorded at all to give it priority over such first mortgage. *Ib.*
17. On foreclosure here of the mortgage given to secure the bond, the complainant, who holds it absolutely by assignment subsequent to such collateral assignment, is entitled to a decree for the amount due upon it in excess of the judgment in New York. *Chew v. Brumaqim*, 520

18. A chattel mortgage duly filed does not, by want of refileing, lose its priority over a subsequent one taken before the time for refileing arrives. *Bank of the Metropolis v. Sprague*, 530

19. If a chattel mortgage is filed, or possession is taken under it before a subsequent mortgage is given, it maintains its priority. *Ib.*

20. The time specified for the payment of a mortgage may be extended by parol. *Tompkins v. Tompkins*, 338

See CAVEAT EMPTOR, 1.
EQUITY OF REDEMPTION.
FRAUDS, STATUTE OF, 1, 2.
LIMITATIONS, STATUTE OF, 5.
PRACTICE, 9, 10.

MORTGAGEE AND MORTGAGOR.

See MORTGAGE, 3, 4, 5, 9.
PRACTICE, 9.

NON USER.

See ABANDONMENT.

NOTICE.

See CONTRACT, 4.
PRACTICE, 3, 11.
PURCHASER.
SPECIFIC PERFORMANCE,
1-3, 32.

NUISANCE.

1. A person may so encourage a nuisance as not only to be deprived of the right to equitable relief, but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance. But where a defendant expended money in erecting a dam, and increasing the capacity of his mill, under a verbal agreement with the owner of lands above for the privilege of overflowing his lands, for a compensation to be made, and filed a bill after the work was completed for the specific performance

of that agreement, and was denied relief, he will be concluded by the decree in that case, and cannot rely on such alleged agreement as a ground for denying relief, on a bill subsequently filed by such owner to enjoin the overflow of his lands and to obtain an abatement of the dam. *Carlisle v. Cooper*, 575

2. Where, as the facts were upon the filing of the bill, the complainant was entitled to relief in a court of equity, the defendant cannot defeat complete redress by a partial abatement of the nuisance, upon an insistence that the effects of such portion of the nuisance as still remain, are not of sufficient consequence to entitle the complainant to ask that perfect relief which he was entitled to when he sought his remedy. *Ib.*

See JURISDICTION, 8, 9, 11, 12.

ORDINANCE.

See CHARTER.

PARENT AND CHILD.

See INFANTS, 2, 3.

PAROL.

See EVIDENCE, 17.
MORTGAGE, 20.

PAROL AGREEMENT.

See CONTRACT, 2, 3.
SPECIFIC PERFORMANCE,
13-15.

PARTIES.

1. When it appears at any time before final decree that a person not made a party is a necessary party to the suit, courts of equity will, of their own motion, arrest the proceedings, that such person may be made a party. *Van Keuren v. McLaughlin*, 163

2. A person who has an interest in property which is the subject matter of a suit, is not a necessary or proper party if his interest cannot, in any way, be affected by the result of the suit. But if it is necessary to have such person in court to settle all or part of the questions in controversy between the parties, he is a necessary party to the suit. The general test is the interest of such person in the object of the suit, sometimes called its subject, in contra distinction to subject matter, *Ib.*
 3. No person is a necessary party against whom the complainant is entitled to no relief, and as against whom, at the hearing, the bill must be dismissed. *Ib.*
 4. An injunction against a defendant to restrain him from receiving a sum of money in the hands of his attorney, or from permitting it to be paid to any one for him or on his behalf, will not be dissolved on motion of the attorney. *Linn v. Wheeler,* 231
 5. No one but a party to a suit can make any motion in it, except for the purpose of being made a party. *Ib.*
 6. Proper parties are not always necessary parties, and where no objection to want of a party as a necessary party was made below, nor such want made a ground of appeal, this court will not permit such question to be raised, unless the party omitted is an indispensable party, and justice cannot be done without him. *Berryman v. Graham,* 370
 7. When it is essential to enable the court to make a complete and final disposition of the subject matter of the controversy, a necessary party will be added at any stage of the cause, unless there are cogent reasons to the contrary. And the record will be remitted to the court below for that purpose. *McLaughlin v. Van Keuren,* 379
 8. The defendants having failed to make the objection of the want of a necessary party below, this question is not entertained on appeal for their benefit, but because the court cannot, with the parties before it, make a decree which will finally and properly dispose of the subject matter in controversy. *Ib.*
 9. Under section 111 of the New York code, a person who assigns a bond as collateral security is a necessary party to a suit brought by his assignee against the obligor of the bond. *Chew v. Brumagim,* 520
- See PLEADING, 9, 11.
PRACTICE, 13.
- ### PARTITION.
1. A court of equity will not interfere with proceedings for partition commenced at law, unless such interference becomes necessary to protect some party thereto from fraud or wrong, or to secure to him some clear right which the law tribunal, from the manner of proceeding before it, cannot secure. For such purpose courts of equity will interfere to prevent a failure of justice and loss of rights. *Hall v. Piddock,* 311
 2. A tenant in common, who has made improvements on the land held in common, is entitled to an equitable partition. The only good faith required in such improvements is that they should be made honestly, for the purpose of improving the property, and not of embarrassing his co-tenants, or encumbering their estate, or hindering partition. The fact that the tenant making such improvements knows that an undivided share in the land is held by another, is no bar to equitable partition. *Ib.*
 3. It is no bar to allowance for improvements in equalizing the partition, that the improvements were made by tenants in common in reversion, during the previous life estate. *Ib.*
 1. Reference to a master, with specific instructions, to ascertain and re

port whether partition cannot be made by payment of owelty; if not, sale will be ordered and improvements allowed for out of proceeds. *Ib.*

5. Costs and expenses of defendants in the proceedings at law for partition, those proceedings being authorized by statute, and arrested by this court in order to more complete equity, will be allowed out of proceeds of sale. *Ib.*

PARTNER.

See MORTGAGE, 7.

PATENT.

See JURISDICTION, 2.

PLEA.

See PLEADING, 4, 6.

PLEADING.

1. Bill for injunction to restrain proceedings at law upon a note and sealed bill, alleged to have been given when the maker was incompetent, also through undue influence, and also alleging that there was a pretended consideration of the conveyance or release of some lands, and asking a discovery of the consideration, and of the value thereof. Defendants answer that the consideration of the note was the release of their interest in some lands, but decline to state the value of the lands, on the ground that the release of the lands, and not their value, was the consideration; and as to the bill, that, being under seal, it needs no consideration. Motion to dissolve denied. Defendants must answer fully as to the value of the lands. *Shotwell's Adm'r v. Struble*, 31
2. The complainant is entitled to a discovery of the consideration of the sealed bill, not on the ground that it would be void without con-

sideration, but on the ground that the want of consideration, together with the imbecility of the testator and some undue influence used by the defendant in procuring its execution, might at law render the bill invalid, when the same imbecility or influence would not affect its validity, if given for a plain and acknowledged debt, justly due from the intestate. *Ib.*

3. If the sealed bill was obtained legally and without fraud, though without consideration, the defendants will be entitled to recover upon it, but in such case it was an advancement by the intestate, and must be brought into hotch-pot before distribution of the personal estate, and the consideration must be disclosed. *Ib.*
4. A plea of release is not void because it is not stated in the plea, or the answer in support of it, that the release was obtained freely and without fraud, when the bill contains no allegation of fraud. *McClane's Adm'r v. Shepherd's Executor*, 76
5. Such issue cannot now be raised by special replication. The modern practice is to permit the complainant to amend his bill by inserting allegations which will raise the issue, and require the defendant to answer as to them. *Ib.*
6. The statute of limitations is a good plea to a bill for an account of trust funds, where the trust is not direct or express, but arises merely by implication. *Ib.*
7. Where an insurance company pays the insured for a loss by fire occasioned by the fault of a railroad company, and the insured afterwards receives the amount from the railroad company, in satisfaction of his damages, he holds it in trust for the insurers, and they may recover it from him by suit in equity. *Monmouth County Fire Ins. Co. v. Hutchinson*, 107
8. If the railroad company does not pay the insured his damages, or

- pays them knowing that he has received the amount insured from the insurance company, the railroad company is liable to the insurance company in a suit at law, which it has the right to bring in the name of the insured, without his consent, to compel repayment of the damages to the amount of the sum paid by it, and a release by the insured to the railroad company would be no defence to such suit. *Ib*
9. But these two remedies cannot be pursued in one suit, neither the insured nor the railroad company is a proper or necessary party to a suit against the other, and in no way are they jointly liable so that a decree could be made, or a judgment given against both. *Ib*
10. When the suit is by bill against both, if the only prayer were for a decree for the payment of the money, a demurrer would be sustained for the misjoinder. But under the general prayer for relief, the bill will be retained to give such equitable relief as the facts may warrant. *Ib*
11. A release by the insured to the railroad company, when the railroad company knew that the insured had received the amount of the insurance, would be a fraud upon the insurance company, and would be void for the fraud. And in such case, the insurance company has the right to have the release declared void before commencing a suit in the name of the insured against the railroad company. In such a suit against the railroad company which holds the release, the insured would be a proper, if not a necessary party. *Ib*
12. Where the allegations of the bill, which, in such a case might give a court of equity jurisdiction, are fully, directly, and circumstantially denied by the answer the denials must, on a motion to dissolve upon bill and answer, be taken as true and the injunction issued to restrain the suit at law be dissolved. *Inhabitants of Winslow v Hudson*, 172
13. It is the settled doctrine, that if the answer admits a contract without stating that it was not in writing and setting up the statute of frauds, the statute cannot be used as a defence. The admission will be held to be of a written contract, and no proof need be offered of it. But if the pleading or answer denies the existence of any agreement, the plaintiff must prove a written agreement. *Walker v. Hill's Ex'rs*, 191
14. Under the prayer for general relief, only such relief can be given as is warranted by facts positively and clearly set forth in the bill. *Ib*
15. An injunction will not be dissolved for new matter in avoidance alleged in the answer, and not responsive to the bill. *W. J. R. Co. v Thomas*, 205
16. A party can have relief, if at all, only on the case made by his bill. Evidence relative to matters not stated in the pleading, nor fairly within its general allegation, is impertinent, and cannot be made the foundation of a decree. *Marshman v Conklin*, 546

See APPELLATE JURISDICTION, 2

POWER

See RAILROAD COMPANY 3

POWER OF SALE

1. Where the will contains no power or direction to sell, such power is not created by implication, because necessary or convenient to enable the executors to execute the directions of the will. *Seeger's Ex'rs v Seeger*, 90

2. When express directions are given to sell, and no person is named to make the sale, the power of sale is held to be in the executors by implication, in cases where it is their duty to distribute or pay out the proceeds. *Ib*

See EXECUTION

PRACTICE.

1. An interlocutory decree made at the hearing in a foreclosure suit, on bill and the answers of two defendants, one of which charged that the mortgage of the other defendant was void for usury, does not adjudicate upon the validity of such mortgage by not directing an account to be taken of the amount due upon it. The question between the two defendants is still open, and is proper to be brought up by a cross-bill. *Vanderveer's Adm'r v. Holcomb*, 105.
2. A cross-bill against a complainant should, in general, be filed at the time of filing the answer, and in all cases before closing the testimony. But the first rule does not apply to a cross-bill by one defendant against another, nor does the last to cases in which no testimony has been taken. *Ib.*
3. *Lis pendens* only takes effect from the service of the subpoena. The statute provides that the suit shall not be notice until the filing of the notice required by the statute, but gives no effect to the notice. It only restrains its effect. *Haughwout v. Murphy*, 118.
4. A writ of error to remove a cause from this court to the Supreme Court of the United States, filed within ten days, Sundays excluded, from the day of filing in this court a decree of the Court of Appeals, is a *supersedeas* under the twenty-third and twenty-fifth sections of the judiciary act of the United States, to stay execution. *Brumagim v. Chew*, 180.
5. The "rendering the judgment," or "passing the decree" complained of, from which the ten days begin, is the filing of the judgment of the Court of Appeals in the court below. *Ib.*
6. A writ of error may be directed either to the highest appellate court of the state where the judgment complained of was rendered, if the record still remains there, or to the court below, if the judgment and record have been remitted. But it must be directed to the court where the record remains. *Ib.*
7. When the record has been remitted to the court below, and the writ of error directed to it, the entering the decree or judgment of the highest court in the court below is to be taken as the time of rendering the judgment or passing the decree complained of. And such decree only becomes a final judgment in the sense of the twenty-third section of the judiciary act, when entered in a court from which execution can issue. *Ib.*
8. An enrollment will be vacated and a decree opened when the decree has been made unjustly against a right or interest that has not been heard or protected, when this has been done without the laches or fault of the party who applies. *Brinkerhoff v. Franklin*, 334.
9. A defendant mortgagee is not bound to put in any defence to the answer of a co-defendant, alleging that his mortgage was without consideration, and fraudulent and void. Such answer could not be taken as confessed against him. *Ib.*
10. A defendant cannot impeach the mortgage of a co-defendant by an answer. A cross-bill is necessary for that purpose. *Ib.*
11. A motion to dismiss because an appeal does not lie, requires notice. *Bank of the Metropolis v. Sprague*, 458.
12. An order refusing to set aside a sale, upon an application based on the illegality of the sale, is appealable; it is not a discretionary order. *Ib.*
13. Where a sale is unfair and illegal, and the property, if fairly sold, would have brought enough to pay a lien creditor, he is aggrieved by an order refusing to set aside the

sale, and is a proper party to appeal. *Ib.*

14. Courts of equity interfere upon a proper application, to set aside sales made by their officers when conducted contrary to principles of law, or when, through fraud or mistake, injustice has been done. They so interfere upon application in the suit in which the sale was made, and even when the purchaser was not a party to the suit. By becoming a purchaser, he subjects himself to the jurisdiction of the court. *Ib.*

15. In strict practice, a complainant is put to his supplemental bill, and a defendant to his own cross-bill, to raise a defence, arising *pendente lite*, affecting a co-defendant. *Bank of the Metropolis v. Sprague*, 530

16. When a party is brought into equity, he is entitled to an equitable decree according to his case as it then exists. *Ib.*

See LIMITATIONS, STATUTE OF, 1, 2.
PARTIES, 1, 4, 5, 7.
PLEADING, 5.

PRAYER.

See PLEADING, 10, 14.
SPECIFIC PERFORMANCE, 8.

PREROGATIVE COURT.

See JURISDICTION, 3-7.

PRESCRIPTION.

1. Prescriptions may be upon condition in restraint of the mode in which the prescriptive right is to be enjoyed, or may have annexed to them a duty to be performed for the benefit of the person against whom the prescription exists. *Carlisle v. Cooper*, 576

2. The prescriptive right to the use or flow of water may be qualified as to times, seasons, and mode of en-

joyment, by the character of the use from which the right has originated. *Ib.*

3. Where the practice in the use of a dam and its appendages during the period of prescription, has been to control the height of the water in the pond in times of high water by removing the gates and permitting the water to flow off, this mode of user qualifies the right which has been acquired by prescription, and a decree permitting the use of such gates, which requires that they shall be removed in times of freshets and high water, is necessary to restrain the flowage of the complainant's lands to what it was accustomed to be during the time of prescription. *Ib.*

See EASEMENT, 1, 3.

PRINCIPAL AND AGENT.

An agent attending a sale for his principal, has no right to buy the property at that sale for himself, or any one else than his principal, at a price less than would secure his principal's claim. He would be held a trustee for his principal, and any written or properly declared trust for any other, would be held subject to the first trust for the principal. *Walker v. Hill's Ex'rs*, 191

PROBATE.

See WILL, 16.

PURCHASE MONEY.

See SPECIFIC PERFORMANCE, 1-3.

PURCHASER.

If a purchaser has before him facts which should put him on inquiry, it is equivalent to a notice of the fact in question, and where such fact constitutes a fraud on a third party, it will not protect the pur-

chaser that he purchased for value.
Tantum v. Green, 364.

See ASSIGNMENT FOR BENEFIT OF
CREDITORS, 2, 3.

ESTOPPEL.

MORTGAGE, 5.

SPECIFIC PERFORMANCE, 1-3, 15.

RAILROAD COMPANY.

1. An act authorizing a railroad company to construct their road along a river does not authorize them to construct it *in* or *upon* the river, but along side of it. The word "along" does not mean "upon," unless the context shows that it is used in the sense of *upon and along*.
Stevens v. Erie R. Co., 259.

2. Authority to construct a railroad *along* a river, must be held not to authorize it to be constructed *in* the river from the subject matter, as it could not be constructed *in* the river, without authority first to fill in the river bed. *Ib.*

3. That a power granted will not be sufficient to effect the object, will not by implication enlarge the power, unless it appears that the legislature in granting it, knew that such construction was necessary to effect the object. The applicants must see to it that the power conferred is sufficient to effect their purpose, and not seek by implication to extend it in a manner which the legislature might not have been willing to grant. *Ib.*

4. Where the provision of an act clearly shows that it was intended that the road authorized by it should be constructed outside of a river, no necessity to go into the river for the construction of it will, by implication, confer authority to construct it in the river. The grant must fail if the road cannot be built outside of the river. *Ib.*

5. Where two railroad companies have the authority to build and run a railroad between the same termini, neither can take exception to

any irregularity or unlawfulness in the exercise of such franchise by the other, unless it can show a particular injury to itself by such course. *Erie R. Co. v. Del., Lack. and West. R. Co.*, 283.

6. Where a party stands by and encourages another in the construction of a public work, at great cost, this court will not interfere with it at his instance. Such conduct estops him from calling in question the legality of the structure. *Ib.*

7. Where a railroad company appropriated land under a belief that they were the owners of it, and the land appeared to be of no particular value to the owners, this court, in the exercise of its discretion, refused to restrain them from its enjoyment. *Ib.*

8. *Quære*. Whether this court will prevent, by injunction, the permanent appropriation of lands by a railroad company acting *ultra vires*, in the absence of irreparable injury. *Ib.*

9. Where a railroad company have irregularly taken lands, but have the capacity to acquire title, this court will not, where the advantage to the complainants would be small, and the injury to the company incalculably great, interpose and stop the running of the cars on such road until the statutory method of acquiring title can be executed. *Ib.*

10. When the title to the lands the use of which the complainants seek to enjoin is in dispute, this court has no jurisdiction. In such case, an injunction is never granted to prevent the enjoyment of the property in dispute by either party who happens to be in possession of it. *Ib.*

11. A court of equity will never lend its active aid to a party who, by a superior knowledge and artful silence, has gained an unfair advantage over another. *Ib.*

12. Under the acts of March 4th and

11th, 1858, (*Pomph. Laws* 204 and 312,) the Delaware, Lackawanna, and Western Railroad Company have a right of way through the Bergen tunnel, and the consequent right to connect their tracks with those running through the tunnel. *Del., Lack. and West. R. Co. v. Erie R Co.*, 298

13. A receiver will not be appointed to supersede permanently the managers of a railway, and to take entire charge of the affairs of the road. But where two railroad companies possess a community of interest in the property in dispute, (as for example, being tenants in common of an easement), this court will exercise judicial control over their conduct towards each other, in order to protect their respective rights. *Ib.*

14. Under the acts of 1858, the Erie Railway Company's trains of every description, have the right of precedence over those of the Delaware, Lackawanna and Western Railroad Company through the Bergen tunnel. But any unlawful use of this privilege, with a view to embarrass or impede the Delaware, Lackawanna and Western Railroad Company in the use of the tunnel, or the road connected with it, will, upon a proper case being made, be a ground of interference by this court. Such case, however, is not made by the present pleadings. *Ib.*

15. The contract of November 1st, 1859, between the Long Dock Company and the Hoboken Land and Improvement Company, (the grantors of the defendants and complainants respectively,) limits the trains having precedence through the tunnel, to those run in conformity with the time tables, and those only, at the present stage of these proceedings, will be allowed precedence. *Ib.*

16. That part of the regulations of the Erie Company giving preference to extra or irregular trains, enjoined. *Ib.*

17. The appointment of a receiver or manager of the tunnel, refused. *Ib.*

See CHARTER.

PLEADING, 7, 8, 11.

REALTY.

See DESCENT, 1.

RECEIVER.

See JUDGMENT CREDITOR, 2.

RAILROAD COMPANY, 13, 17.

Weissenborn v. Sieghortner, 483.

RELEASE.

See PLEADING, 4, 5, 8, 11.

RESCISSION.

See SPECIFIC PERFORMANCE, 20.

REVOCATION.

See CONTRACT, 4.

RULE TO SHOW CAUSE.

If the day to show cause is less than two months from the date of the rule even by one day, the order to sell is erroneous, and must be set aside on appeal. And as this rule is the proceeding by which jurisdiction is acquired, this defect appearing on the record, would avoid the proceeding collaterally. *Bray v. Neill's Ex'ors*, 343

SALE.

See CAVEAT EMPTOR.

PRACTICE, 13, 14.

SALE OF LANDS FOR PAYMENT OF DEBTS.

1. An account of the personal estate of an intestate, on application to an Orphans Court for sale of lands to pay debts, which refers only to

an inventory filed in another state, is not a compliance with the statute, unless a copy of the inventory is annexed. *Bray v. Neill's Executrix*, 343

2. A final account settled in the probate court of another state, relating only to the personal estate of the decedent, is not evidence against devisees of the real estate in this state, who had no interest in the personal estate, and would not have been heard on the settlement of that account. *Ib.*

3. On application for sale of lands to pay debts, it is necessary that the Orphans Court should ascertain and determine the amount of the deficiency of the personal estate required to be raised by the sale of lands. *Ib.*

4. On such application it is necessary that the court should ascertain and decide that the personal estate which had come to the hands of the applicant, had been applied to the payment of debts. *Ib.*

5. When the applicant had received and sold lands devised by the testator, and which ought to contribute to the payment of debts, it is error to order lands of other devisees to be sold for the payment of debts paid by the applicant, without deducting the proportion the applicant ought to pay. *Ib.*

6. Lands devised to a widow in lieu of dower, if accepted by her, are liable to their proportion of the debts of the testator. *Ib.*

7. Where an executrix to whom lands are devised for a certain time, neglects to apply for an order for sale to pay debts until her estate expires, and in the meantime enjoys the estate, and takes the rents and profits of it, she must account for the value of the estate so enjoyed, and deduct its fair proportion of the debts in ascertaining the amount to be raised from the other devisees. *Ib.*

SATISFACTION.

See MORTGAGE, 9.

SEALED INSTRUMENT.

See MORTGAGE, 1.
PLEADING, 1-3

SEPARATE ESTATE.

See MARRIED WOMEN.

SHERIFF'S SALE.

Mere inadequacy of price is not sufficient to set aside a sheriff's deed, nor is it, *per se*, proof of fraud. But even if there has been no fraud, if the inadequacy of price is gross, and the party whose property has been sold, by reason of mistake or misapprehension did not attend the sale, and the sacrifice was caused by such mistake or misapprehension, the sale will be set aside. *Kloepping v. Stillmacher*, 328

SPECIFIC PERFORMANCE.

1. A person who has contracted for the purchase of land, may compel any one who, after such contract and with notice of it, takes the legal title from the vendor, to perform the contract. The subsequent purchaser, to hold the title against such contract of sale, must be a *bona fide* purchaser, without notice, and must have paid the purchase money. *Haughwout v. Murphy*, 118

2. If part of the purchase money remains unpaid after the sale, as to such part such second purchaser is not protected, but it may be claimed by the prior purchaser. But in such case the purchaser will hold the legal title conveyed to him free from any claim under the prior contract, except to the purchase money not paid until after notice of the contract. *Ib.*

3. That a mortgage was given as security for the payment of the unpaid purchase money, is not sufficient to protect such subsequent purchaser. He is only protected as to money actually paid before notice. *Ib.*
4. A delay of two years and a half not accounted for in bringing suit to compel specific performance, is fatal to relief. *Ib.*
5. A receipt for \$100, part of the consideration of an alleged contract for sale of lands, which does not describe the land or mention the price to be paid, without any other memorandum in writing, is not sufficient to found a decree for specific performance. The property to be conveyed, and the price to be paid, must be designated with certainty. *Welsh v. Bayaud.* 186
6. Where the fee is in the wife, a contract by her husband for the sale of her land, would not, if enforced, give title. A decree to convey would be complied with by his giving a deed of bargain and sale, without covenants, upon payment of the consideration. *Ib.*
7. In a suit for specific performance upon such a contract, the husband could not be compelled to procure a conveyance from his wife, nor could she in such suit, in any other way, be compelled to execute it. *Ib.*
8. Nor can a decree be made for the repayment of the money paid on signing the contract, under a prayer for general relief in a suit for specific performance. *Ib.*
9. The question being merely whether the complainant was half owner of certain lands, and entitled to a conveyance of an undivided half thereof the facts of the case held to substantiate complainant's claim. *Lawrence v. Lawrence,* 317
10. A suit in the nature of a suit for specific performance, requires diligence in performance and in bringing suit. A suit for the declaration of a resulting trust does not require the same diligence. *Ib.*
11. Where two purchase lands, and one takes the title in his own name, but his co-purchaser has paid his whole share of the consideration and has been permitted to possess and enjoy the property, delay in bringing suit for his moiety will not bar relief. *Ib.*
12. A party who would seek specific performance must be prompt in asking the aid of the court. Unreasonable delay will, of itself, be often a bar to a suit of this character. *Merritt v. Brown,* 401
13. Executed parol agreements to buy in property at a sheriff's sale for the benefit of defendants in execution, can be sustained only on the ground of fraud. *Ib.*
14. When the elements of the case are, simply, a purchase under a parol promise to hold for the benefit of the defendant in execution, such a transaction cannot be enforced, either at law or in equity. *Ib.*
15. The defendant agreed by parol to purchase property at a sheriff's sale for the benefit of the defendant in execution; the latter, at the time of the agreement, assigning to him twenty-five shares of stock to make the purchase "more beneficial to him." It was also agreed that the defendant in execution should raise the purchase money, and take the property within sixty days after the sale. *Held,* that the defendant in execution having failed to raise the money and redeem the property for over two years, and having permitted, in the interim, the purchaser to improve the property, and in some respects use it as his own, had lost his right to enforce the specific performance of the contract. *Held also,* that the stock stood as collateral security, and that the purchaser must account for its value, it having been sold by him. *Ib.*
16. Upon an application for a specific performance of a contract, the court must be satisfied that the claim is fair, reasonable, just, and

- equal, in all its parts. *Crane v. Decamp*, 414
17. To determine these qualities, the court will look not merely at the terms of the agreement, but at the relations of the parties, and the surrounding circumstances. *Ib.*
18. A party seeking a specific performance of a contract, must show that he has performed, or been ready and willing to perform all the essential terms of his contract. *Ib.*
19. Time and modes of payment, attended by special circumstances of hardship and loss caused thereby, are circumstances to be weighed by the court in exercising a sound legal discretion. *Ib.*
20. The surrender of a written contract of sale, followed by acts inconsistent with the continuance of the same, such as negotiating a sale to another party by the surrenderer for the benefit of the surrenderee, held to be in equity a rescission of such contract. *Ib.*
21. Penalties, forfeitures, and securities for conditions broken, are not favored in equity. They are usually held to be securities for the payment of money, and the performance of conditions, when compensation can be thus made. *Grigg v. Landis*, 494
22. Covenants contained in deeds and agreements, prescribing the mode in which the premises shall be improved, and in restraint of their use, will be sustained, within reasonable limitations. *Ib.*
23. Time may be made of the essence of a contract in equity by the express stipulations of the parties, or it may arise by implication from the nature of the property, or the avowed objects of the seller or the purchaser. *Ib.*
24. Circumstances inconsistent with an intention to enforce a strict compliance, such as proceeding with the purchase after an actual and complete breach, will be construed as a waiver. *Ib.*
25. A knowledge of the breach before waiver will be presumed, where the facts shown are such that the party should be charged with notice in favor of equitable rights consequent upon such supposed waiver. *Ib.*
26. Where time is of the essence of a contract, the party having the option to insist must make the point promptly, before other equities intervene. *Ib.*
27. A collateral covenant restraining the assignment of an agreement will not be enforced in equity, where it appears in the contract that such restraint is but an incident to the objects of the principal covenants which have been substantially performed. *Ib.*
28. The general rule is, that in equity time is not of the essence of the contract, unless the parties have expressly so stipulated, or it necessarily follows from the nature and circumstances of the contract. *King v. Ruckman*, 599
29. A contract for the sale of land is regarded in equity for most purposes as if it had been specifically executed. The purchaser becomes the equitable owner of the land, and the seller of the purchase money. *Ib.*
30. Not inequitable in this case to decree performance, though payment or offer of payment was not made on the day fixed. *Ib.*
31. Parol evidence of conversations before the execution of a contract, is not admissible to alter its terms and thus render it a contract of which time is of the essence. But a defendant to a bill for specific performance may offer such conversation in evidence as independent proof, to rebut an equity set up by complainant. *Ib.*
32. Notice that the defendant would not extend time for payment, cannot aid him. Complainant was

ready with the money on the day of payment. *Ib.*

33. The complainant being present with the money at the time and place where he understood payment was to be made, the defendant, after seeking the next day to repudiate the contract, and refusing three days afterwards to receive the money, when complainant expressed willingness to pay it, cannot be relieved from his contract in a court of equity on the ground that the money was not tendered at the proper place. *Ib.*

34. What lands were intended to be embraced in the contract, can be sufficiently gathered from contract, bill, and answer, without resorting to parol evidence, to warrant a decree for specific performance. *Ib.*

See CONTRACT, 1-3.

SUBROGATION.

See MORTGAGE, 10.
PLEADING, 8.

SUPERSEDEAS.

See PRACTICE, 4.

SUPPLEMENTAL BILL.

See PRACTICE, 15.

SURPLUS PROCEEDS.

See DESCENT, 1.

TAKING LANDS.

See RAILROAD COMPANY, 7-9.

TENANT FOR LIFE.

See INFANT'S LANDS, 1.

TIME.

See SPECIFIC PERFORMANCE, 23, 26, 28.

TRUST AND TRUSTEE.

See CONTRACT, 2.
EVIDENCE, 17.
PLEADING, 7.
PRINCIPAL AND AGENT.

UNDUE INFLUENCE.

See FRAUD, 3.
PLEADING, 2.

VENDOR AND PURCHASER.

See CAVEAT EMPTOR.
SPECIFIC PERFORMANCE, 29.

WAIVER.

See SPECIFIC PERFORMANCE, 24, 25.

WATERCOURSE.

See EASEMENT.
JURISDICTION, 10, 11.
LICENSE.
NUISANCE.
PRESCRIPTION, 1-3.

WILL.

1. The rule in Shelley's case must govern in the construction of wills made prior to June 13th, 1820, in all cases where it is applicable. *Quick's Ex'r v. Quick*, 13
2. The rule applies, even when another estate for life is interposed between the death of the first tenant for life, and the estate to his heirs. *Ib.*
3. A devise, upon the decease of a tenant for life, to heirs "as the law directs" in case of dying intestate, means as the law was at the time of making the will, and not as it might be at the death of the tenant for life. *Ib.*
4. Such limitation, as it gives the estate at the death of the life tenant to persons who may not then be his heirs-at-law, or in shares different from those prescribed by the law at that time, prevents the

- application of the rule in *Shelley's Case* and the effect of the testamentary life interest as would have been the case had he died at the date of the will must take as precedence at the death of the testator. *Ib.*
7. A direction by a testator that the proceeds of certain lands be applied to erect a house for his family, intended with no other direction as to those lands leaves them under control of the testator's estate. *Lowell v. Adams & Lowell*. 51
8. A declaration after devising lands to his son H. that "I do not therefore give him any further portion" does not bar H. from inheriting part of the land as to which testator died intestate. *Ib.*
9. The word "children" will not be construed to include grandchildren, unless there is something in the context to show that the testator intended that it should include grandchildren, or unless the provision will be inoperative without such construction. *Edw. Ellis v. Vanatta*. 54
10. Upon an ordinary limitation by way of remainder to children, &c., in a class, all who are *in esse* at the time of the death of the testator take vested and consequently transmissible interests, immediately upon the testator's death. *Ib.*
11. A provision by a testator for a home for his widow and minor children until all become of age, under the direction of their mother, will be defeated as to the widow, by her election not to accept it in lieu of dower as provided in the will. But the substantial benefit intended for the infant children by devoting the amount directed to their support, will not be wholly defeated by such election of the widow; and a court of equity will see to it that the amount set apart by the testator for that purpose shall be applied to the benefit of the infants substantially as intended by the testator. *Roe's Ex'rs v. Roe*, 251
12. A will made at such an age that the testatrix was ninety-eight years old at the time she made her will, in the absence of any proof of testamentary incapacity, or of any fraud, or coercion, or undue influence in procuring the will, is not sufficient ground for refusing to admit the will to probate. *Collins v. Toronto*. 170
13. Where a will is declared null and void, a gift of legacies specified in the fourth paragraph will not be held to be by mistake of the legatee in another paragraph, though some probability that the testator would more likely have given to these last legatees. To make the express and definite words of a bequest, it must clearly appear that the testator did not intend what is said, and this by the provisions of the will.
14. In case of a will made at such an age, in favor of a daughter with whom the testatrix had lived for years, her other children have the right to require it to be clearly proved that she executed the will, understanding that it was her testamentary act. *Ib.*
15. When, however, they go beyond this, and continue litigation by a protracted inquiry into the capacity of the testatrix, it is in the discretion of the court to allow contestants' costs, or to allow costs against them. *Ib.*
16. A bequest to a daughter, of the interest on a bond and mortgage, and the dividends on certain specified shares of stock for life, with a direction that if necessary for her support the stock may be sold, and

the proceeds of such sale and the principal of such bond paid to her, leaves a contingent residue undisposed of in such moneys and stock, which will pass under a general residuary clause. *Clerk's Ex'rs v. Richards*, 361

16. At the time of the execution of the will the testator's hearing was seriously impaired, and his eyesight almost gone; probate of the will refused, because it did not appear that its contents were in any way made known to him before or at the time of its execution. *Harris v. Vanderpool's Ex'rs*, 561.

17. The burden of proof is on the proponent; it will not be presumed from the fact that the testator had testamentary capacity, that he would not have executed the will without understanding its contents. *Ib.*

18. Not necessary to decide whether testator's declarations, before and after execution of the will, are admissible. *Ib.*

See EXECUTION.

POWER OF SALE.

WITNESS.

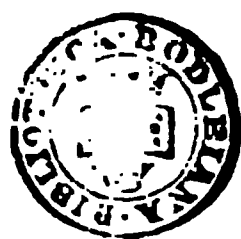
1. Under the act of April 17th, 1868 a wife was not a competent witness in a suit by or against her husband, but only in a suit by or against her. Being offered as a witness in this cause against the husband prior to the passage of the act of March 17th, 1870, authorizing her testimony on behalf of any party to a suit, she was incompetent. *Van Houten's Ex'rs v. Post*, 355

2. Objection to a witness on the ground of incompetency, must be made when he is offered for examination, if the incompetency be then known. The adverse party will not be permitted to sit by and hear the witness examined without objection, and failing to make anything out of him, to interpose the objection to competency. *Berrymann v. Graham*, 375

See EVIDENCE.

WRIT OF ERROR.

See PRACTICE, 4-7.



X

